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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, ET AL.,
Petitioners,

V.

JOHN L. FASHING, ET AL.,
Respondents.

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether provisions of the state constitution may be struck down pursuant to the equal protection clause when no fundamental right is involved and where the sole basis for such decision is that the classifications made by the state constitution are somewhat imperfect.

LIST OF PARTIES

Petitioners

William P. Clements, Jr.
Mark White
George W. Strake, Jr.

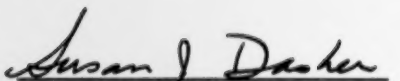
Respondents

John L. Fashing
Jose J. Baca
Walter McGhee
C. Johnny Ybarra
Donovan Webb
Owen Short
Pat Haggerty
William V. Fashing
Loretta Doerr
Arthur Abraham
Sam Snoddy
James L. Lee
Bill Eubank
George C. Johnston
Jim Heathman
Lupe Manago
Juan S. Martinez
Luisa G. Ybarra
Frank Escobar
Phillip E. Bargman
Herbert Erhlich
Michael T. Milligan
Edward W. Dunbar
Roger L. Moore
C. John Galvan

The undersigned counsel certifies that the following attorneys have an interest in the outcome of this case on behalf of their respective clients:

For the Petitioners: Mark White, Attorney General of Texas; John W. Fainter, Jr., First Assistant; Richard E. Grav. III. Executive Assistant; Paul R. Gavia, Chief, State and County Affairs; and Susan J. Dasher, Assistant Attorney General.

For the Respondents: Raymond C. Cabellero.



SUSAN J. DASHER
Assistant Attorney General

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JURISDICTIONAL STATEMENT

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COME William P. Clements, Jr., Governor of the State of Texas; Mark White, Attorney General of Texas; and George W. Strake, Jr., Secretary of State for the State of Texas, by and through their attorney, Susan J. Dasher, Assistant Attorney General of Texas, and file this their jurisdictional statement in the above-captioned cause.

JURISDICTION

On January 23, 1980, the United States District Court for the Western District of Texas, El Paso Division, issued a judgment, memorandum opinion and order enjoining officers of the State of Texas from enforcing provisions of its constitution. The district court's order was pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983. The matter was appealed to the United States

Court of Appeals for the Fifth Circuit, No. 80-1107, and that honorable court issued its opinion, unpublished, adopting the memorandum and opinion of the district judge on October 31, 1980.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS

> No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office or profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extend a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected. TEX.CONST. art. 3, §18.

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under

the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST. art. 3, §19.

A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

Provided, however, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special or primary election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (l) year, such announcement or such candidacy shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur. TEX.CONST.art. 11,§*11.*

The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for 'Place No. 1,' 'Place No. 2,' etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for a tem of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX.CONST. art. 16§65.

STATEMENT OF THE CASE

Respondents brought this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Declaratory Judgment Act, 28 U.S.C. §2201 and 2202, seeking to challenge the constitutionality of Article 3, Section 19, and Article 16, Section 65, of the Constitution of the State of Texas. Some of the Respondents were public officials who sought to run for higher office but who did not want to resign their present offices in so doing. Another group of Respondents were voters who were desirous of voting for these officeholders if they sought higher office.

The matter was heard on cross motions for summary judgment in the United States District Court for the Western District of Texas, El Paso Division, on January 3, 1980, and the district court issued its judgment, memorandum opinion and order on January 23, 1980. On January 25, 1980, the district court granted the Respondents' request for an injunction. The State Petitioners filed their notice of appeal on February 4, 1980. Oral argument was heard in the United States Court of Appeals for the Fifth Circuit on October 29, 1980. The appellate court issued its opinion on October 31, 1980, which opinion is unpublished and adopts the opinion of the district court.

ARGUMENT

The sections of the Texas Constitution which are at issue in this cause provide as follows:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, of this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST.art. 3, §19.

> . . . if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX.CONST. art.16, §65.

The various constitutional provisions challenged here, as well as some not challenged,[1] identify which officeholders are affected.

Not all holders of offices are required to resign; however, the imperfection of the classification is not a basis, standing alone and when no fundamental right is at issue, for the intrusion of a federal court in the state legislative scheme.

This Court should take jurisdiction because this case implicitly stands for the proposition that there is a fundamental right to candidacy. Without using strict scrutiny to review these constitutional provisions, the court below would have been unable to find a violation of the equal protection clause.

The leading case in the Fifth Circuit on the rights of candidates for public office and their supporters is the en banc decision in *Morial v. Judiciary Com'n of State of La*, 565 F. 2d 295 (5th Cir. 1977). In its opinion, the Court of Appeals for the Fifth Circuit specifically addressed the issue of whether candidacy was a fundamental right and, relying on Supreme Court decisions, found it was not. *Morial*, at 301. The Fifth Circuit further found that the interest of voters in supporting certain political candidates is not sufficiently substantial to warrant strict scrutiny.

The Supreme Court has never declared a right to candidacy to be a fundamental right. Instead, the Supreme Court has said that "barriers standing in the path of potential candidates" do not automatically invoke the strict scrutiny standard. *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134

[1] *See*, Article 3, Section 18, and Article 11, Section 11, which are identical resign-to-run provisions covering different officeholders.

(1972). The courts have found that the interest must be weighed with respect to "the extent and nature of the impact on voters, examined in a realistic light" in order to determine the standard to be applied. *Henderson v. Fort Worth Independent Sch. Dist.*, 526 F.2d 286, 291 (5th Cir. 1976).

The State asserted that there is no disagreement that the reason for these provisions in the Texas Constitution is to prevent conflict of interest, the prevention of abuse of office by incumbent officeholders, the assurance that the incumbents in office would give undivided attention to the offices already held and the elimination of any appearance of impropriety during and after the campaign. As the court below found, these are legitimate state interests, yet against the demonstrated showing of legitimacy, these constitutional provisions were found unnecessary to vindicate the above listed interests.

Historically, provisions limiting dual officeholding have prevailed. Indeed, Article 3, Section 19, finds its origin in a 1348 petition from the House of Commons to the king "that no person summoned to Parliament should be either a taxer, collector or receiver or the fifteenth then granted." Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* (1978). The language of this section has remained virtually unchanged since the first Texas constitution in 1836. In addition, Texas case law has invalidated elections and candidacies when officeholders violate the provisions of these sections. *See, Kirk v. Gordon*, 376 S.W. 2d 560 (Tex. 1964); *Lee v. Daniels*, 377 S.W.2d 618 (Tex. 1964); *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964). *See also*, U.S.CONST. art. I, §6, cl. 2, which provides that:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the

> United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

It bears consideration that these so-called resign-to-run statutes do not preclude candidacy. They preclude candidacy only prior to the last year of office. That particular structure is further indication of the State's concern with potential misuse of office and inattention to duties of office. Both Article 3, Section 19, and Article 16, Section 65, are reasonable exercises of the power reserved for the people of Texas to control processes of election, to prescribe qualifications for officeholders and to prevent abuse of public office. Other federal courts have rejected equal protection challenges similar to the one before the Court here. *See, Perry v. St. Pierre*, 518 F.2d 184 (2d Cir.); *Magill v. Lynch*, 560 F2d 22 (1st Cir. 1977). To invalidate provisions of the State's constitution, which constitution has been unchanged for 100 years, should be done only under the most egregious circumstances. There is no fundamental right in this cause, and the proper test, when the Court evaluated these provisions of the Texas Constitution, should have been minimal rationality. The Court's rejection of the State's interests and their necessity is offensive to concepts of federalism.

Respectfully submitted,

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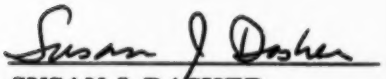

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APPENDIX

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Attorneys for State Petitioners

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

JOHN L. FASHING, et al,	*	
	*	
Plaintiffs,	*	
	*	
v.	*	EP-78-CA-126
	*	
JUDGE T. UDELL MOORE, et al,	*	
	*	
Defendants.	*	

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action under the Civil Rights Act of 1871, 42 U. S. C. §1983, and the Declaratory Judgement Act, 28 U. S. C. §§2201, 2202, seeking to challenge the constitutionality of Article III, Section 19, and Article XVI, Section 65, of the Constitution of Texas. Some of the Plaintiffs are public officials, to wit: Fashing is a Judge of the County Court-at-Law; Baca and McGhee are Justices of the Peace; and Ybarra is a Constable. The remaining Plaintiffs are identified as citizens and registered voters of El Paso County and of other counties in the State of Texas. All seek to enjoin the Defendants from enforcing the provisions of the Texas Constitution under attack, contending that the sections in question contravene the rights guaranteed to Plaintiffs in the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Both Fashing and McGhee assert that they would become candidates for higher judicial office but for the terms of Article XVI, Section 65, which would cause the automatic vacation of their present offices. According to Ybarra, the same fact prevents his candidacy for Justice of the Peace. Baca additionally asserts that he would consider a candidacy for the Texas Legislature were it not for the provisions of Article III, Section 19,

which prohibit his filing for that position. The voter Plaintiffs all contend that they desire to vote for and support the candidacy of the public official Plaintiffs for the offices mentioned, but are being deprived of that right in violation of the United States Constitution.

Some of the named Defendants, to wit: the County Judge and County Commissioners of El Paso County and the County Democratic Party officials, have announced that they do not contest the Plaintiffs' suit, and they agree with Plaintiffs' contention that the sections in question are unconstitutional. The Governor, Attorney General, and Secretary of the State of Texas, however, continue to defend the suit, and deny that Plaintiffs are entitled to any relief. All material facts have been stipulated by the parties, and the case is before the Court on the State officials' motion to dismiss and on cross-motions for summary judgment.

I. *The Sections Challenged*

Article III, Section 19, of the Constitution of Texas, adopted in 1876, provides as follows:

> "No judge of any court, Secretary of State, Attorney General, Clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

The language of this section has remained virtually unchanged since the first Texas Constitution in 1836. It traces back to a 1701 Act of the British Parliament, which forbade persons holding an office under the King from serving in the House of Commons, thereby preventing any undue influence of the executive upon the Parliament. Vernon's Texas Const. Ann., Art III, § 19, Interpretive Commentary. Texas case law has held

invalid the election or candidacy of an officeholder whose term of office extends into the term of the Legislature to which he seeks election, even if he has vacated the previous office. *Kirk v. Gordon*, 376 S.W.2d 560 (Tex. Sup. 1964); *Lee v. Daniels*, 377 S.W. 2d 618 (Tex. Sup. 1964); *Willis v. Potts*, 377 S.W. 2d 622 (Tex. Sup. 1964). Furthermore, the term "lucrative office under . . . this State" has been broadly interpreted to include virtually all officials of cities and counties. *Willis v. Potts, supra*, 377 S.W. 2d at 625-6.

By contrast, the challenged portion of Article XVI, Section 65, was added to the Texas Constitution in 1958. It provides that

> ". . . if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled."

The officers covered by the section include county judges and judges of county courts at law, probate, and domestic relations courts; justices of the peace; constables, district and county clerks; district and county attorneys; sheriffs; county tax collectors, county commissioners and county treasurers. State officials not covered by Section 65 include the Governor; Lieutenant Governor; Attorney General; Land Commissioner; Railroad Commissioners; all members of the legislature; justices or judges of the Supreme

Court, Court of Criminal Appeals or Courts of Civil Appeals; district and criminal district judges; judges of family and juvenile courts, and municipal judges.

II. *The Motion to Dismiss.*

The State Defendants have moved to dismiss the suit, contending that (1) Plaintiffs lack standing, in that they have failed to show an actual injury of such immediacy and reality to warrant a declaratory judgment; (2) the Court lacks subject matter jurisdiction, in that no actual "case or controversy" is presented, (3) suit is barred by the Eleventh Amendment. The first two contentions are without merit. Federal courts are empowered to decide cases arising under 42 U. S. C. §1983, pursuant to jurisdiction conferred by 28 U. S. C. §1343(3) and 28 U. S. C. §§2201, 2202, when the "course of conduct in which the plaintiff plans to engage is clear to the court at the time the suit is filed." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F. 2d 295, 298 (5th Cir. 1977) (en banc). Plaintiffs herein have shown by affidavit the course of conduct in which they desire and intend to engage but for the restrictions imposed by Article III, Section 19, and Article XVI, Section 65. Actual conduct which would invoke the operation of the sections under attack is not a prerequisite to challenging their validity. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Indeed, "preconduct challenges to the validity of laws burdening First Amendment rights are among the essential bulwarks of a system of free expression." *Morial v. Judiciary Commission of the State of Louisiana, supra*, 565 F. 2d at 298. The Court has jurisdiction and the Plaintiffs have standing to bring the action.

Neither is suit barred by the Eleventh Amendment. Since *Ex Parte Young*, 209 U. S. 123 (1908), it has been established that a federal court may enjoin a state

official from enforcing a state statute that violates the United States Constitution. Such an official is "stripped of his official character," because the state "has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young, supra*, 209 U.S. at 160. *See also, Alabama v. Pugh*, 438 U. S. 781 (1978); *Hutto v. Finney*, 437 U. S. 678(1978); *Edelman v. Jordan*, 415 U. S. 651 (1974), all of which uphold injunctive relief against specified State officials. Since the instant suit is not brought against the State of Texas as such, but against designated state officials empowered to enforce the Texas constitutional provisions under attack, the Eleventh Amendment does not bar injunctive relief.

Defendants also assert that Plaintiffs have not alleged nor shown an intent on the part of Defendants to discriminate against them. However, a specific intent to deprive a plaintiff of his constitutional rights is not a prerequisite to liability under § 1983. *Monroe v. Pape*, 365 U. S. 167, 198 (1961).

The motion to dismiss by the State Defendants should be denied.

III. *Do Article III, Section 19, and Article XVI, Section 65, Violate the United States Constitution?*

Plaintiffs claim that the challenged sections impair their First, Fifth and Fourteenth Amendment rights to freedom of speech and freedom of association, to seek and hold elective office, and to vote. Furthermore, they claim the sections in question violate the Equal Protection Clause of the Fourteenth Amendment.

The right to engage in political activities is not absolute, and both state and federal governments may place restrictions upon the political activities of public employees. *United States Civil Service Commission v. National Association of Letter Carriers*, 413 U. S. 548

(1973); *Broadrick v. Oklahoma*, 413 U. S. 601 (1973). However, such a restriction is constitutionally permissible only if it is ". . . justified by a reasonable necessity. . . to burden those activities to achieve a compelling public objective." *Morial v. Judiciary Commission of Louisiana*, *supra*, 565 F. 2d at 300. Thus it is necessary to compare the interests asserted by the Plaintiffs with those of the State, to determine whether or not a reasonable necessity has been shown for the imposition of those substantial burdens.

Article XVI, Section 65, is basically a "resign-to-run" rule, and thus invites comparison with the Louisiana rule upheld by the Fifth Circuit in *Morial*. Such comparison immediately reveals that Section 65 goes far beyond the Louisiana statute. In Louisiana, only judges who become candidates for non-judicial offices are required to resign; in Texas, the law additionally expels from office some judges who file for a different judicial office (e.g., a county judge who runs for district judge), and certain non-judicial officers who wish to run for any position other than that presently held (e.g., a constable who runs for justice of the peace or sheriff). Since the Texas restrictions are so much broader, the State would have a heavy burden of showing them to be reasonably necessary to achieve a compelling State objective, so as to uphold their validity under the First Amendment. In the case of Section 65, however, it is not necessary to reach that issue, since the Court finds that the classification it creates violates the Equal Protection clause of the Fourteenth Amendment.

To be constitutionally permissible, the classification created by Section 65 must ". . . serve important governmental objectives," and be ". . . substantially related to achievement of those objectives." *Craig v. Boren*, 429 U. S. 190, 197 (1977). The State Defendants argue that Section 65 serves the following objectives: (1) the prevention of abuse of office by incumbent officeholders, not only during campaigns, but

afterwards, if the candidate loses his bid for a new office; (2) the compulsion of incumbents to give their undivided attention to the offices already held; (3) the elimination of any appearance of impropriety during and after campaigns; and (4) the prevention of conflicts of interest. While these are legitimate state interests, the constitution further requires that the classification embodied in Section 65 be reasonably necessary to vindicate these interests. *Morial v. Judiciary Commission of the State of Louisiana, supra*, 565 F. 2d at 304. This is the respect in which it fails. Can a classification be upheld which allows a municipal court judge (not covered by Section 65) to run for district judge without resigning his office, while a justice of the peace (covered by Section 65) cannot? How can a rule be justified which permits a district judge to run for the Court of Civil Appeals without vacating his office, while a county court-at-law judge may not do so? Merely to state the questions is to make obvious the answers. The classification fails to serve any proper governmental interest, and it is constitutionally impermissible. *Turner v. Fouche*, 396 U. S. 346, 362-3 (1970); *Carrington v. Rash*, 380 U. S. 89 (1965).

Article III, Section 19, likewise creates classifications that are individiously discriminatory. Some executive and judicial officers who desire to seek legislative office, but whose terms happen to overlap with the legislative term, are barred from running even if they resign their present offices. This prohibition affects mayors and city councilmen, whose terms typically end in April of a non-election year, as well as many judges and other officials serving four-year terms. No reciprocal prohibition, however, is placed upon a legislator seeking to run for mayor or judge. A further distinction is drawn between those executive and judicial officers whose terms end concurrently with the beginning of the legislative term, who may run, and those whose terms overlap the legislative term, who may not run. *See, Willis v. Potts*

supra. Section 19 is not a prohibition against dual office holding, which would be a proper exercise of the state's power*1*. Nor is it a "resign-to-run" rule, such as the one upheld in *Morial*. It is not reasonably related to the achievement of important governmental objectives, *Craig v. Boren, supra*, but rather embodies distinctions that violate the federal constitutional guarantee of equal protection of the laws. *Turner v. Fouceh, supra; Carrington v. Rash, supra; Skinner v. State of Oklahoma ex rel Williamson*, 316 U. S. 535, 540 (1942). *See, Barry v. District of Columbia Board of Elections and Ethics*, 448 F. Supp. 1249, 1253-5 (D.D.C. 1978).

IV. *Conclusions.*

The Plaintiffs have standing to bring this suit, and the motion to dismiss should be denied. The Court finds that the challenged provisions of Article XVI, Section 65, and Article III, Section 19, of the Texas Constitution contravene the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The Defendants' motion for summary judgement should be granted.

It is therefore ORDERED that Defendants' motion to dismiss be, and it is hereby, DENIED.

It is further ORDERED that the Defendants' motion for summary judgment be, and the same is hereby, DENIED.

It is further ORDERED that the Plaintiffs' motion for summary judgment be, and the same is hereby, GRANTED.

*1*The State of Texas does prohibit dual office holding elsewhere in its Constitution. Constitution of Texas, Article XVI, Sections 12, 40.

SIGNED AND ENTERED this 23rd day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-1107

JOHN L. FASHING, ET AL.,
Plaintiffs-Appellees,

v.

JUDGE T. UDELL MOORE, ET AL.,
Defendants,

THE GOVERNOR, THE ATTORNEY GENERAL AND THE SECRETARY OF STATE OF THE STATE OF TEXAS,
Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas

OCTOBER 31, 1980

Before AINSWORTH, Circuit Judge, KUNZIG, Judge,* and RANDALL, Circuit Judge.

PER CURIAM:

Affirmed on the basis of the Memorandum Opinion and order of District Judge Harry Lee Hudspeth dated January 23, 1980.

AFFIRMED.

*Judge of the United States Court of Claims, sitting by designation.

Office-Supreme Court, U.S.
FILED
AUG 17 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1290

IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM

WILLIAM P. CLEMENTS, JR., GOVERNOR of the State of Texas, et al.,

Appellants

VS.

JOHN L. FASHING, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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APPEAL DOCKETED JANUARY 21, 1981
PROBABLE JURISDICTION NOTED JUNE 1, 1981

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RELEVANT DOCKET ENTRIES

1. July 10, 1978; Original Complaint filed

2. August 10, 1978; Defendants' Motion to Dismiss and Answer filed

3. November 11, 1978; Plaintiffs' Motion for Summary Judgment filed

4. December 12, 1978; Defendants' Cross-Motion for Summary Judgment filed

5. December 26, 1979; Answers to Interrogatories from Defendants Honorable Dolph Briscoe, John L. Hill and Steven Oaks filed

6. January 23, 1980; Memorandum Opinion and Order and Judgment filed

7. January 25, 1980; Order Granting Injunction filed

8. February 4, 1980; Defendants' Notice of Appeal from Orders entered on January 23, 1980 and January 25, 1980 filed

9. October 31, 1980; Judgment of the United States Court of Appeals for the Fifth circuit filed

10. November 26, 1980; Judgment of October 31, 1980 issued to clerk as Mandate

11. January 21, 1981; Notice of Appeal to the Supreme Court of the United States filed

12. June 1, 1981; Order noting probable jurisdiction filed in the United States Supreme Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Plaintiffs move the Court, pursuant to Rule 56 of the Rules of Civil Procedure, to enter judgment for the Plaintiffs for the relief demanded in their complaint, on the ground that there is no genuine issue as to any material fact in this action and that Plaintiffs are entitled to a judgment as a matter of law, as appears from the pleadings and the answer filed by the Defendants represented by the El Paso County Attorney in which they admit all facts alleged in Plaintiffs' Complaint and that Section 65 of Article XVI, Texas Constitution, is unconstitutional, Stipulation Number One, Stipulation Number Two which has not been signed by the Texas Assistant Attorney General, the interrogatories propounded and their answer, and the affidavits of Woodrow W. Bean, F.B. Escobar, Jr., Phillip E. Bargman, Mrs. Guadalupe R. Manago, James L. Lee,

John Galvan, Daniel M. Anchondo, Enrique Pena, Lloyd McConnell, Arthur Abraham, Mrs. Luisa G. Ybarra, George McAlmon, Sam W. Callan, Roger Moore, William V. Fashing, Colbert Coldwell, Sam M. Paxson, John L. Fashing, Jose J. Baca, C. Johnny Ybarra, Loretta A. Doerr, LaDonna McConnell, Sam Snoddy, Walter McGhee, Sam Blackham, Bill Eubank, James Heathman, and other persons indicated in said affidavits attached hereto and made a part of this Motion.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TO THE HONORABLE UNITED STATES DISTRICT COURT:

Defendants move this Court, pursuant to Federal Rule of Civil Procedure 56, to enter judgment for Defendants and against Plaintiffs. Defendants agree that there is no material issue of fact in this action. Defendants are entitled to a judgment as a matter of law, as

appears from the pleadings, stipulation, interrogatories and affidavits filed in this action, that Section 65 of Article XVI, Texas Constitution and Section 19 of Article III, Texas Constitution are constitutional.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al.,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al.,
Defendants

NO. EP-78-CA-126

ANSWERS TO INTERROGATORIES
FROM DEFENDANTS
HONORABLE DOLPH BRISCOE,
JOHN L. HILL AND STEVEN OAKS

1. List all Texas State interests that support the constitutionality of the resign-to-run rule of Article XVI, Section 65, Texas Constitution.

   (a) Compels officeholders to give undivided attention to his/her office for at least three years of a four year term;

   (b) Prevents abuse of office during campaign and post campaign if officeholder loses;

(c) Eliminates appearance of impropriety during and after campaign.

2. Set forth all Texas State interests that support the constitutionality of the ineligibility to seek office rule of Article III, Section 19, Texas Constitution.

(a) Prevents conflicts of interest.

3. List all differences between Texas Appellate Judges or Justices, Texas District Court Judges, and Texas County Court at Law Judges that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against a County Court at Law Judge, but not against Texas Appellate Judges or Justices and District Court Judges.

(a) The amendment to the Texas Constitution, Article XVI, Section 65, occurred in 1954 and was coupled with legislation which allowed the listed officeholders to serve terms up to four years. The nonlisted judicial posts were increased to four year terms in 1949 and apparently the legislature did not see fit to pass legislation comparable to Section 65 at that time. In 1954 the question was not before them.

4. State whether the Texas State interests to be advanced in the resign-to-run rule of Article XVI, Section 65, Texas Constitution, are the same in regard to all the judiciary within the State of Texas.

(a) No information available as issue was not before the legislature in 1954.

5. State the Texas State interests that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against only part of the Judiciary within the State of Texas.

   (a) Same answer as to Interrogatories Three and Four.

6. State the Texas State interests that support the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, against a County Court at Law Judge and the other members of the Judiciary named in said Constitutional provision who seek election to another judicial office.

   (a) Same answer as to Interrogatories Three and Four.

7. State the Texas State interest that support permitting a Texas District Court Judge and Texas Appellate Judges or Justices to announce his candidacy or in fact become a candidate in general, special or primary election, for another Texas judicial office at a time when the unexpired term of his office then held exceeds one year without being required to resign by law the judgeship then held.

   (a) Same answer as to Interrogatories Three and Four.

8. State the Texas State interests that support permitting a Texas District Court Judge and Texas Appellate Judges or Justices to announce their candidacy or in fact become a candidate, in a general, special or primary election, for a non-judicial office at a time when the unexpired term of his office then held exceeds one year without being required to resign by law the judgeship then held.

(a) Same answer as to Interrogatories Three and Four.

9. State how a Texas County Court at Law Judge could abuse his office while being a candidate for another judicial office.

(a) Judicial rulings could be influenced by the presence or absence of political support by litigants appearing before the particular judge.

(b) Court personnel and services could be utilized for campaign purposes.

10. State how a Texas County Court at Law Judge can abuse his office while being a candidate for a non-judicial office.

(a) Same answer as to Interrogatory Nine.

11. State how a Texas State District Judge could abuse his office while being a candidate for another judicial office.

(a) Same answer as to Interrogatory Nine.

12. State how a Texas State District Judge could abuse his office while being a candidate for non-judicial office.

(a) Same answer as to Interrogatory Nine.

13. State what the improprieties would be that the State would prevent by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, in regard to each office named in Article XVI, Section 65, Texas Constitution.

(a) The balanced non-paratisan image of the judiciary is compromised by partisan political activities or statements. The resignation eliminates such appearance of impropriety.

(b) With respect to non-judicial officeholders listed in Section 65 any areas which allow for discretionary acts within the officeholders position require the appearance of objective evenhandedness. Political activities compromise this evenhanded appearance.

14. State what the improprieties would be that the State could prevent by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, to all elected officers within the State of Texas who are not now named in Article XVI, Section 65, Texas Constitution.

(a) With respect to judicial offices the answer is the same as to Interrogatory Thirteen, part (a).

(b) With respect to non-judicial officeholders the answer is the same as to Interrogatory Thirteen, part (b).

15. State what the abuse of office that would be prevented by the application of the resign-to-run rule of Article XVI, Section 65, Texas Constitution, to all elected officers within the State of Texas who are not now named in Article XVI, Section 65, Texas Constitution.

(a) The facilities and personnel of the given office could be utilized for campaign purposes.

(b) The power of the office could be traded for political support.

16. List all of the elected offices within the State of Texas that are not subject to the resign-to-run of Article XVI, Section 65, Texas Constitution.

    (a) Defendants object to this Interrogatory as the information is public record and equally available to plaintiffs as to defendants.

17. State why the resign-to-run rule of Article XVI, Section 65, Texas Constitution, does not apply to the Judge of the County Criminal Court of Appeals of Dallas County, Texas (Article 1970-31.20, V.A.T.S.), the Judge of County Civil Courts of Law of Harris County, Texas (Article 1970-110e, V.A.T.S.), the Judge of the County Court of Bexar County for Criminal Cases (Article 1970-301g, V.A.T.S.), the Judge of County Court Number 1 of Galveston County, Texas (Article 1970-342a, V.A.T.S.) and Judges of Municipal Courts of El Paso, Texas (1200d and 1200ee, V.A.T.S.)

    (a) The answer is the same as to Interrogatories Three and Four.

18. State how resign-to-run rule of Article XVI, Section 65, will insure the actual and perceived integrity of the Texas Judiciary when said rule does not apply to all members of the Texas Judiciary.

    (a) The answer is the same as to Interrogatories Three and Four.

19. If one of the interests of the State is to prevent abuse of Judicial office by a judge-candidate during the course of a campaign, state why the resign-to-run rule only applies at a time when the unexpired term of a judge, who is subject to said rule, exceeds one year.

(a) Allowing political activity during the last year of an officeholder's term is merely recognition of the fact that the officeholder must seek re-election in any event. It is a compromise to the fact of the political process.

20. If one of the interests of the State is to prevent abuse of judicial office by judges who have lost their election bids and return to the bench, state why the resign-to-run rule only applies to those judicial officers named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices.

(a) The answer is the same as to Interrogatories Three and Four.

21. If one of the interests of the State is to prevent abuse of Judicial office by a judge-candidate during the course of a campaign, state why the resign-to-run rule only applies to those judicial offices named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices.

(a) The answer is the same as to Interrogatories Three and Four.

22. If one of the interests of the State is to prevent abuse of judicial office by judges who have lost their electoral bids and return to the bench, state why the resign-to-run rule only applies at a time when the unexpired term of a judge, who is subject to said rule, exceeds one year.

(a) The answer is the same as to Interrogatory Nineteen.

23. If one of the interests of the State is to eliminate even the appearance of impropriety by judges both during and after a campaign, state why the resign-to-run rule only applies to those judicial officers named in Article XVI, Section 65, Texas Constitution, and not to all other judicial offices, and only at a time when the unexpired term of office then held exceeds one year.

    (a) The answer is the same as to Interrogatories Three, Four and Nineteen.

24. List the differences between those judicial offices names in Article XVI, Section 65, Texas Constitution, and the judicial offices not named in said constitutional provision that justifies the application of the resign-to-run rule against the second group of judicial officers.

    (a) The answer is the same as to Interrogatories Three and Four.

25. List the differences between these non-judicial officers named in Article XVI, Section 65, Texas Constitution, and the non-judicial officers not named in said constitutional provisions that justify the application of the resign-to-run rule against the first group of non-judicial officers and not against the second group of non-judicial officers.

    (a) The answer is the same as to Interrogatories Three and Four.

26. List the differences between all those officers named in Article XVI, Section 65, Texas Constitution and all officers not named in said constitutional provisions that justify the application of the resign-to-run rule against the first group of officers and not against the second group of officers.

(a) The answer is the same as to Interrogatories Three and Four.

27. State the differences between those officers named in Article III, Section 19, Texas Constitution, and those elected public officials within the State of Texas not named in said constitutional provisions that justify the application of the ineligibility to seek office rule of said constitutional provisions against the first group and not against the second group.

(a) Article III, Section 19 applies to all holders of a lucrative office. As the provision is to prevent conflict of interest it bars all persons without distinction who by virtue of state employment might have a conflict.

28. State all of the elected offices within the State of Texas that are not subject to the ineligibility to seek office rule of Article III, Section 19, Texas Constitution.

(a) Any holders of a non-lucrative office.

29. State the Texas State interests that support permitting a member of the Texas State Legislature to seek judicial or executive office during his term of office in the legislature.

(a) The conflict of interest is not present when a lawmaker leaves the lawmaking position.

30. State the differences between members of the Texas Legislature and those officers named in Article III, Section 19, Texas Constitution, that justify the ineligibility to seek office rule of Article III, Section 19, Texas Constitution, with there being no exact same rule for the members of the Texas Legislature.

(a) The answer is the same as to Interrogatory Twenty-Nine.

(Certificate of service omitted in printing)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al,
Plaintiffs

v.

JUDGE T. UDELL MOORE, et al,
Defendants

NO. EP-78-CA-126

MEMORANDUM OPINION AND ORDER

Plaintiffs bring this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Declaratory Judgement Act, 28, U.S.C. §§2201, 2202, seeking to challenge the constitutionality of Article III, Section 19, and Article XVI, Section 65, of the Constitution of Texas. Some of the Plaintiffs are public officials, to wit: Fashing is a Judge of the County Court-at-Law; Baca and McGhee are Justices of the Peace; and Ybarra is a Constable. The remaining Plaintiffs are identified as citizens and registered voters of El Paso County and of other counties in the State of Texas. All seek to enjoin the Defendants from enforcing the provisions of the Texas Constitution under attack, contending that the sections in question contravene the rights guaranteed to Plaintiffs in the First, Fifth, and Fourteenth Amendments to the Constitution of the United States. Both Fashing and McGhee assert that they would become candidates for

higher judicial office but for the terms of Article XVI, Section 65, which would cause the automatic vacation of their present offices. According to Ybarra, the same fact prevents his candidacy for Justice of the Peace. Baca additionally asserts that he would consider a candidacy for the Texas Legislature were it not for the provisions of Article III, Section 19, which prohibit his filing for that position. The voter Plaintiffs all contend that they desire to vote for and support the candidacy of the public official Plaintiffs for the offices mentioned, but are being deprived of that right in violation of the United States Constitution.

Some of the named Defendants, to wit: The County Judge and County Commissioners of El Paso County and the County Democratic Party officials, have announced that they do not contest the Plaintiffs' suit, and they agree with Plaintiffs' contention that the sections in question are unconstitutional. The Governor, Attorney General, and the Secretary of the State of Texas, however, continue to defend the suit, and deny that Plaintiffs are entitled to any relief. All material facts have been stipulated by the parties, and the case is before the Court on the State officials' motion to dismiss and on cross-motions for summary judgment.

I. The Sections Challenged

Article III, Section 19, of the Constitution of Texas, adopted in 1876, provides as follows:

> "No judge of any court, Secretary of State, Attorney General, Clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature."

The language of this section has remained virtually unchanged since the first Texas Constitution in 1836. It traces back to a 1701 Act of the British Parliament, which forbade persons holding an office under the King from serving in the House of Commons, thereby preventing any undue influence of the executive upon the Parliament. Vernon's Texas Const. Ann., Art III, §19, Interpretive Commentary. Texas case law has held invalid the election or candidacy of an officeholder whose term of office extends into the term of the Legislature to which he seeks election, even if he has vacated the previous office. *Kirk v. Gordon*, 376 S.W.2d 560 (Tex.Sup. 1964); *Willis v. Potts*, 377 S.W.2d 622 (Tex.Sup. 1964). Furthermore, the term "lucrative office under . . . this State" has been broadly interpreted to include virtually all officials of cities and counties. *Willis v. Potts, supra*, 377 S.W.2d at 625-6.

By contrast, the challenged portion of Article XVI, Section 65, was added to the Texas Constitution in 1958. It provides that

> ". . . if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of his State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled."

The officers covered by the section include county judges and judges of county courts at law, probate, and

domestic relations courts; justices of the peace; constables, district and county clerks; district and county attorneys; sheriffs; county tax collectors, county commissioners and county treasurers. State officials not covered by Section 65 include the Governor; Lieutenant Governor; Attorney General; Land Commissioner; Railroad Commissioners; all members of the legislature; justices or judges of the Supreme Court, Court of Criminal Appeals or Courts of Civil Appeals; district and criminal district judges; judges of family and juvenile courts, and municipal judges.

II. The Motion to Dismiss.

The State Defendants have moved to dismiss the suit, contending that (1) Plaintiffs lack standing, in that they have failed to show an actual injury of such immediacy and reality to warrant a declaratory judgment; (2) the Court lacks subject matter jurisdiction, in that no actual "case or controversy" is presented, (3) suit is barred by the Eleventh Amendment. The first two contentions are without merit. Federal courts are empowered to decide cases arising under 42 U.S.C. §1983, pursuant to jurisdiction conferred by 28 U.S.C. §1343(3) and 28 U.S.C. §§220k, 2202, when the "course of conduct in which the plaintiff plans to engage is clear to the court at the time the suit is filed." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295, 298 (5th Cir. 1977)(en banc). Plaintiffs herein have shown by affidavit the course of conduct in which they desire and intend to engage but for the restrictions imposed by Article III, Section 19, and Article XVI, Section 65. Actual conduct which would invoke the operation of the sections under attack is not a prerequisite to challenging their validity. *Steffel v. Thompson*, 415 U.S. 452, 459 (1974). Indeed, "preconduct challenges to the validity of laws burdening First Amendment rights are among the essential bulwarks of a system of free expression." *Morial v. Judiciary Commission of the State*

of Louisiana, supra, 565 F.2d at 298. The Court has jurisdiction and the Plaintiffs have standing to bring the action.

Neither is suit barred by the Eleventh Amendment. Since *Ex Parte Young*, 209 U.S. 123 (1908), it has been established that a federal court may enjoin a state official from enforcing a state statute that violates the United States Constitution. Such an official is "stripped of his official character," because the state "has no power to impart to him any immunity from responsibility to the supreme authority of the United States." *Ex Parte Young, supra,* 209 U.S. at 160. *See also, Alabama v. Pugh,* 438 U.S. 781 (1978); *Hutto v. Finney,* 437 U.S. 678 (1978); *Edelman v. Jordan,* 415 U.S. 651 (1974), all of which uphold injunctive relief against specified State officials. Since the instant suit is not brought against the State of Texas as such, but against designated state officials empowered to enforce the Texas constitutional provisions under attack, the Eleventh Amendment does not bar injunctive relief.

Defendants also assert that Plaintiffs have not alleged nor shown an intent on the part of Defendants to discriminate against them. However, a specific intent to deprive a plaintiff of his constitutional rights is not a prerequisite to liability under §1983. *Monroe v. Pape,* 365 U.S. 167, 198 (1961).

The motion to dismiss by the State Defendants should be denied.

III. Do Article III, Section 19, and Article XVI, Section 65, Violate the United States Constitution?

Plaintiffs claim that the challenged sections impair their First, Fifth and Fourteenth Amendment rights to freedom of speech and freedon of association, to seek and hold elective office, and to vote. Furthermore, they

claim the sections in question violate the Equal Protection Clause of the Fourteenth Amendment.

The right to engage in political activities is not absolute, and both state and federal governments may place restrictions upon the political activities of public employees. *United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548 (1973); *Broadrick v. Oklahoma,* 413 U.S. 601 (1973). However, such a restriction is constitutionally permissible only if it is ". . . justified by a reasonable necessity . . . to burden those activities to achieve a compelling public objective." *Morial v. Judiciary Commission of Louisiana, supra,* 565 F.2d at 300. Thus it is necessary to compare the interests asserted by the Plaintiffs with those of the State, to determine whether or not a reasonable necessity has been shown for the imposition of those substantial burdens.

Article XVI, Section 65, is basically a "resign-to-run" rule, and thus invites comparision with the Louisiana rule upheld by the Fifth Circuit in *Morial.* Such comparison immediately reveals that Section 65 goes far beyond the Louisiana statute. In Louisiana, only judges who become candidates for non-judicial offices are required to resign; in Texas, the law additionally expels from office some judges who file for a different judicial office (e.g., a county judge who runs for justice of the peace or sheriff). Since the Texas restrictions are so much broader, the State would have a heavy burden of showing them to be reasonably necessary to achieve a compelling State objective, so as to uphold their validity under the First Amendment. In the case of Section 65, however, it is not necessary to reach that issue, since the Court finds that the classification it creates violates the Equal Protection clause of the Fourteenth Amendment.

To be constitutionally permissible, the classification created by Section 65 must " . . . serve important

governmental objectives," and be " . . . substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1977). The State Defendants argue that Section 65 serves the following objectives: (1) the prevention of abuse of officeholders, not only campaigns, but afterwards, if the candidate loses his bid for a new office; (2) the cumpulsion of incumbents to give their undivided attention to the offices already held; (3) the elimination of any appearance of impropriety during and after campaigns; and (4) the prevention of conflicts of interest. While these are legitimate state interests, the constitution further requires that the classification embodied in Section 65 be reasonably necessary to vindicate these interests. *Morial v. Judiciary Commission of the State of Louisiana, supra*, 565 F.2d at 304. This is the respect in which it fails. Can a classification be upheld which allows a municipal court judge (not covered by Section 65) to run for district judge without resigning his office, while a justice of the peace (covered by Section 65) cannot? How can a rule be justified which permits a district judge to run for the Court of Civil Appeals without vacating his office, while a county court-at-law judge may not do so? Merely to state the questions is to make obvious the answers. The classification fails to serve any proper governmental interest, and it is constitutionally impermissible. *Turner v. Fouche*, 396 U.S. 346, 362-3 (1970); *Carrington v. Rash*, 380 U.S. 89 (1965).

Article III, Section 19, likewise creates classifications that are individiously discriminatory. Some executive and judicial officers who desire to seek legislative office, but whose terms happen to overlap with the legislative term, are barred from running even if they resign their present offices. This prohibition affects mayors and city councilment, whose terms typically end in April of a non-election year, as well as many judges and other officials serving four-year terms. No reciprocal prohibition, however, is placed upon a legislator seeking to run

for mayor or judge. A further distinction is drawn between those executive and judicial officers whose terms end concurrently with the beginning of the legislative term, who may run, and those whose terms overlap the legislative term, who may not run. *See, Willis v. Potts, supra.* Section 19 is not a prohibition against dual office holding, which would be a proper exercise of the state's power.[1] Nor is it reasonably related to the achievement of important governmental objectives, *Craig v. Boren, supra,* but rather embodies distinctions that violate the federal constitutional guarantee of equal protection of the laws. *Turner v. Fouche, supra; Carrington v. Rash, supra; Skinner v. State of Oklahoma ex rel Williamson,* 316 U.S. 535, 540 (1942). See, *Barry v. District of Columbia Board of Elections and Ethics,* 448 F. Supp. 1249, 1253-5 (D.D.C. 1978).

IV. Conclusions.

The Plaintiffs have standing to bring this suit, and the motion to dismiss should be denied. The Court finds that the challenged provisions of Article XVI, Section 65, and Article III, Section 19, of the Texas Constitution contravene the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. The Defendants' motion for summary judgment should be granted.

It is therefore ORDERED that Defendants' motion to dismiss be, and it is hereby, DENIED.

It is further ORDERED that the Defendants' motion for summary judgment be, and the same is hereby, DENIED.

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[1]The State of Texas does prohibit dual office holding elsewhere in its Constitution. Constitution of Texas, Article XVI, Sections 12, 40.

It is further ORDERED that the Plaintiffs' motion for summary judgment be, and the same is hereby, GRANTED.

SIGNED AND ENTERED this 23rd day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order entered in the above-styled and numbered cause on January 23, 1980.

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, entered for the Plaintiffs, and the relief sought by the Defendants be, and it is hereby, in all things, DENIED.

SIGNED AND ENTERED this 23rd day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

JOHN L. FASHING, et al,
Plaintiffs

V.

JUDGE T. UDELL MOORE, et al,
Defendants

NO. EP-78-CA-126

ORDER GRANTING INJUNCTION

In accordance with the Memorandum Opinion and Order, and Judgment, entered in the above-styled and numbered cause on January 23, 1980,

It is hereby ORDERED, ADJUDGED, and DECREED that the Defendants herein be, and they are hereby, ENJOINED from enforcing the provisions of Article 3, Section 19, of the constitution of Texas, and of the last paragraph of Article 16, Section 65 of the constitution of Texas.

SIGNED AND ENTERED this 25th day of January, 1980.

HARRY LEE HUDSPETH
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

NO. 80-1107

JOHN L. FASHING, et al.,
Plaintiffs-Appellees,

V.

JUDGE T. UDELL MOORE, et al.,
Defendants,

THE GOVERNOR, THE ATTORNEY GENERAL AND THE SECRETARY OF STATE OF THE STATE OF TEXAS
Defendants-Appellants

Appeal from the United States District Court for the Western District of Texas

OCTOBER 31, 1980

Before AINSWORTH, Circuit Judge,
KUNZIG, Judge,* and
RANDALL, Circuit Judge.

PER CURIAM:

Affirmed on the basis of the Memorandum Opinion and order of District Judge Harry Lee Hudspeth dated January 23, 1980.

AFFIRMED.

*Judge of the United States Court of Claims, sitting by designation.

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor
of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Fifth Circuit

APPELLEES' MOTION TO AFFIRM

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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

APPELLEES' MOTION TO AFFIRM

By this motion Appellees move to affirm the judgment of the United States Court of Appeals for the Fifth Circuit. For reasons set forth in more detail below, the record and the issues have been fully developed and briefed, the court below has reached a correct decision, and that decision should be affirmed by this Court on the basis of the existing record.

QUESTION PRESENTED

Whether the two lower federal courts were correct that certain classifications of public officials under the Texas Constitution were invidious, served no proper governmental interest, and were therefore invalid under the Equal Protection Clause.

OPINIONS BELOW

The opinion of the district court is published at 489 F.Supp. 471. The Court of Appeals for the Fifth Circuit adopted the opinion of the district court, and its opinion was not published.

STATEMENT OF THE CASE

This is an appeal by the State Appellants from an unpublished per curiam opinion of the Fifth Circuit which affirmed the district court's findings that Article III, Section 19, and the last paragraph of Article XVI, Section 65, of the Texas Constitution created classifications which were invidiously discriminatory and failed to serve any proper governmental interest and were, therefore, invalid under the Equal Protection Clause of the Fourteenth Amendment.

This case was decided on cross-motions for summary judgment. Appellants offered no summary judgment evidence to justify the classifications in issue. The Appellee offered summary judgment evidence that there was no justification for the classifications, and said evidence was not controverted by the Appellants. Appellants defend the classifications in issue before

this Court on the theory that "somewhat imperfect" classifications are constitutionally permissible.

Article III, Section 19, makes ineligible as candidates to the Texas Legislature the following public officials:

a. All judges of any court
b. Secretary of State
c. Attorney General
d. Clerk of any court of record
e. Any person holding lucrative public office.

There is no reciprocal prohibition, however, placed upon any legislator seeking to run or be appointed to any of the above public offices.

Article XVI, Section 65, provides that certain officials automatically vacate their office if they announce as a candidate for any office other than the office they hold and they have more than one year remaining before the end of their term.

The Section 65 resign-to-run rule applies to the following public officials:

a. District clerks
b. County clerks
c. County judges
d. Judges of county courts at law
e. Judges of county criminal courts
f. Judges of county probate courts
g. Judges of county domestic relations courts
h. County treasurers
i. Criminal district attorneys
j. County surveyors
k. Inspectors of hides and animals
l. County commissioners
m. Justices of the Peace
n. Sheriffs
o. Assessors and collectors of taxes
p. District attorneys
q. County attorneys
r. Public weighers
s. Constables

Some of the elected officers to whom Section 65 does not apply are as follows:

a. Governor
b. Lieutenant Governor
c. Comptroller of Public Accounts
d. Treasurer
e. Commissioner of the General Land Office
f. Attorney General
g. Railroad Commissioner
h. State Legislature
i. Any justice or judge of all Texas appellate courts
j. District or criminal district courts
k. Family district courts
l. Juvenile courts
m. Corporation or municipal courts

n. Most mayors, city councilmen, school board members
o. Any judge or presiding officer of any special court.

ARGUMENT

The Fourteenth Amendment to the United States Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Constitutional state provisions, like any legislative acts, constitute "state actions" within the meaning of the Equal Protection Clause. Bullock v. Carter, 405 U.S. 134, 140 (1972).

A. Article III, Section 19. This provision of the Texas Constitution of 1876 can be found in the Texas Constitution of 1845 (Art. III, Sec. 25, Art. VII, Sec. 13), 1861 (Art. III, Sec. 25), 1866 (Art. III, Sec. 24), 1869 (Art. III, Sec. 30, and Art. XII, Sec. 9). It is a broad prohibition preventing virtually any elected or appointed office holder from being a candidate for the

Texas Legislature "during the term for which he is elected or appointed . . . ."

This means, for example, that those persons holding elective offices under municipal government are not eligible for election to the Texas Legislature even if they resign, simply because the term for which they are elected would overlap into the legislative term. Moreover, no person holding office for four years could resign at mid-point in the term to run for the legislature because the term would overlap into that legislative term. No similar prohibition exists barring legislators from office in a similar fashion. Article III, Section 19, therefore, creates a classification and a distinction.

The creation by the State of barriers to a candidate's access to the ballot and the corresponding limitations of the field of candidates does not alone require close scrutiny of the provision. However, the prohibition does deny some voters the

right to choose from other candidates and artificially does shield the legislators from competition. That scheme does obviously have an important impact on the exercise of the franchise; therefore, the law does require "close scrutiny" to see that it is "reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Bullock v. Carter, supra, 405 U.S. at 144.

The only State objective raised by the Appellant in its answer to an interrogatory was that Article III, Section 19, prevented conflicts of interest. The provision makes ineligible for a legislative seat virtually any office holder. The State made no attempt to demonstrate why one office holder would have a conflict of interest in running for the legislature when an incumbent would not. The provision is a simple attempt by incumbents to perpetuate themselves in

office. Certainly that should not be a legitimate State interest which the courts should assist in furthering.

Both the trial and appellate courts below found the classification created to be invidious and invalid under the Equal Protection Clause.

B. Article XVI, Section 65. In November, 1954, XVI-65 became part of the Texas Constitution and at that time did not contain the last paragraph, which was the provision challenged in this suit. In 1954, the provision simply held that certain named officers would have four-year terms instead of two-year terms. Furthermore, the terms of office were staggered so that not all the terms of office would expire at the same time. Prior to 1958, various office holders already had four-year terms of office--among them, judges of the Supreme Court, the Court of Criminal Appeals, the various courts of civil appeals, and others.

Section XVI-65 increased to four years the terms of office for county courts, county courts at law, and justices of the peace, as well as other office holders.

In 1958, the challenged last paragraph was added to XVI-65. It was a totally new law and provided that those listed office holders in XVI-65 would automatically vacate their offices if they either announced their candidacy or in fact became candidates for any other office when more than one year remained in their term. For example, Plaintiff Fashing here was elected to serve a four-year term. If at the end of two years he became a candidate for a district judgeship, he automatically vacated that office he held, that of County Court at Law Judge.

Other judges, such as district judges and judges of the courts of civil appeals, the Court of Criminal Appeals, and the Supreme Court were not bound by a similar

automatic resign-to-run rule, nor, indeed, were municipal court judges. Thus a classification was created, which classificiation must be supported by valid and necessary State interests in order that the provision not violate the Equal Protection Clause.

The sole justification for the classification discrimination at issue offered by the Appellants in this Court and the courts below is that the provision is only "somewhat imperfect." The record is barren of any indication that there are any distinctions between the public officials covered by the burden of the classifications and the public officials not so burdened. Rather, the Appellees' summary judgment evidence shows that in fact there are no distinctions between these public officials for the purposes of Sections 19 and 65. Can a state constitutionally enact a resign-to-run law or ineligible-to-the-legislature law which

operates against one group of public officials but not against another group without any reason for the unequal treatment other than a contention that "somewhat imperfect" laws concerning the right to candidacy and to vote are not a denial of equal protection? Certainly not, for the classifications between public officials in this case were found to be invidious by the two federal courts below.

A classification that is found to be invidiously discriminatory is one which has no reasonable basis and is arbitrary and irrational. In light of this finding in the case at bar, this Court need not articulate a standard of review based upon the character and substantiality of the First Amendment interest of Appellees that is impaired by the restrictions on their political right by Sections 19 and 65. Rather, the standard of judicial review for social and economic legislation can be

applied here to affirm the lower courts. Once any type of legislative classification is found to be invidious, irrational, or arbitrary, it violates equal protection of law under any standard of review. See, United States Railroad Retirement Board v. Fritz, 49 L.W. 4035 (1980); Schweiker v. Wilson, 49 L.W. 4207 (1981); Kirchberg v. Feenstra, 49 L.W. 4270 (1981); and Michael M. v. Superior Court of Sonoma County, 49 L.W. 4273 (1981).

The factual findings made by the courts below of invidious classification will justify this Court to affirm under Rule 16 on the long-established practice not to reconsider findings of fact--here invidious classification--concurred in by two lower federal courts, unless shown to be clearly erroneous. See, United States Railroad Retirement Board v. Fritz, supra, at n.7, dissent by Justice Brennan; Blaue v. Lehman, 368 U.S. 403, 408-409 (1962);

Faulkner v. Gibbs, 338 U.S. 267, 268 (1949); United States v. Dickinson, 331 U.S. 745, 751 (1947); and United States v. Commercial Credit Co., 286 U.S. 63 (1932). The Appellants have not challenged the fact findings of the two lower courts in this Court.

Of course, in the event this Court notes probable jurisdiction, Appellees will assert many more grounds in support of the lower court judgment, whether or not such were relied upon or even considered by the lower courts. See Dandridge v. Williams, 397 U.S. 471, 475, n.6 (1970); accord, California Bankers Association v. Shultz, 416 U.S. 21, 71 (1974); and Langnes v. Green, 282 U.S. 531, 538-539, (1931). This Court may summarily affirm on the sole basis of the factual finding of invidious classification under the rational basis standard.

Finally, Appellants asserted in the lower courts that Section 19 is a prohibition against dual office holding. The lower court pointed out that Section 19 is not a dual office holding prohibition. The Appellants are still asserting at page eight of their jurisdictional statement that Section 19 is a dual office holding rule. This is incorrect. In Texas one is not eligible for the Texas Legislature, even if one resigns one's office before the election. See Willis v. Potts, 377 S.W.2d 622 (Tex. 1964); and Willis v. City of Fort Worth, 380 S.W.2d 814 (Tex.Civ.App. 1964 n.r.e.). Yet all Texas legislators are eligible for all non-legislative offices, notwithstanding that their term of office overlaps the new office they seek, such as a judgeship. The Texas dual office holding rule is found in Article XVI, Section 40, Texas Constitution. Said rule is self executing, for in Texas, when the holder

of one office accepts and qualifies for a second, he automatically relinquishes the first office. See, State ex. rel. Kingsburg v. Brinkerhoff, 17 S.W. 109 (Tex. 1886); Pruitt v. Glen Rose Independent School District No. 1, 84 S.W.2d 1004 (Tex. 1935); and Centeno v. Inselmann, 519 S.W.2d 889 (Tex.Civ.App. 1975).

In this case the Appellants have advanced some State interest or purpose for the resign-to-run rule, but the question remains whether objectives of the resign-to-run rule are advanced in a manner consistent with equal protection of the law. In Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), a valid state interest or purpose did not save a bad classification. The court stated as follows: "As in all equal protection cases, however, the crucial question is whether there is an appropriate governmental interest suitably furthered

by the differential treatment." 408 U.S. at 95.

In this case, although State interests or purposes in the resign-to-run rule may have merit, Texas has determined that all non-Section 65 officials need not be subject to a resign-to-run rule. However, Texas has offered no reason for its unequal treatment, and the lower federal courts in this case found no justification for the rule. Therefore, equal protection is denied.

Although the courts below based their decision solely on the Equal Protection Clause of the Fourteenth Amendment, the ruling may be affirmed by this Court on additional, independent bases under the First Amendment, Dandridge v. Williams, supra; and California Bankers Association v. Shultz, supra, as it is applied to the states through the Fourteenth Amendment, Gitlow v. New York, 268 U.S. 652 (1925); and De Jong v. Oregon, 299 U.S. 353

(1937); and Near v. Minnesota, 283 U.S. 697 (1931).

Although a variety of standards of scrutiny have been utilized by the courts, one standard which can be used in this case is that restrictions on protected activities "are constitutionally permissible if justified by reasonable necessity . . . to burden those activities to achieve a compelling objective." Morial v. Judiciary Commission of Louisiana, 565 F.2d 295, 300 (5th Cir. 1977)(en banc).

To be compelling, the state interests should be of such force that they are "irresistible" or "overpowering," to use two dictionary definitions. In the case of those State interests which were advanced in this case under both III-19 and XVI-65, how could they be compelling objectives when the State only applied them to some officials but not to others? If they were so overpowering, they would

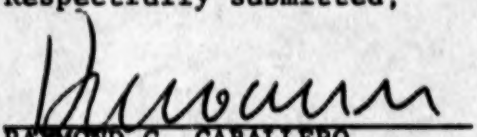
necessarily be applied to all officials similarly situated. Therefore, by its unequal treatment, the State's burden to prove a compelling objective fails at the same time on both First Amendment and equal protection grounds.

The State has attempted to justify the treatment of officials, but it has never sought to justify or explain the difference in treatment among the officials. Although it has been given an opportunity at every stage of these proceedings, the State has not ever attempted to explain the reason for the difference in treatment.

CONCLUSION

For all the foregoing reasons, Appellees urge this Court summarily to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,



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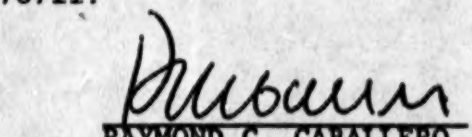
CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 1981, a true copy of the foregoing Motion to Affirm was served upon Ms. Susan J. Dasher, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711.



RAYMOND C. CABALLERO

Office-Supreme Court, U.S.
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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, et al.,

Appellants

VS.

JOHN L. FASHING, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution violates the First and Fifth Amendments to the United States Constitution?

2. Whether Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

1. John L. Fashing, Jose J. Baca, Walter McGhee, C. Johnny Ybarra, Donovan Webb, Owen Short, Pat Haggerty, William V. Fashing, Loretta Doerr, Arthur Abraham, Sam Snoddy, Bill Eubank, Jim Heathman, Lupe Manago, Juan S. Martinez, Luisa G. Ybarra, Frank Escobar, Phillip E. Bargman, Herbert Ehrlich, Michael T. Milligan, Edward W. Dunbar, Roger L. Moore, C. John Galvan, James L. Lee and George C. Johnston, Plaintiffs-Appellees.

2. Judge T. Udell Moore, Clyde C. Anderson, Richard Telles, Rogelio Sanchez, C.W. "Chuck" Mattox, William Clements, Mark White, George Strake and Mary R. Haynes, Defendants-Appellants

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NO. 80-1290

IN THE
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WILLIAM P. CLEMENTS, JR., Governor
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Appellants

VS.

JOHN L. FASHING, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPELLANTS' BRIEF ON THE MERITS

REFERENCE TO PRIOR DECISIONS

The opinion of the District Court of the United States for the Western District of Texas, Harry Lee Hudspeth, Judge Presiding in Cause No. EP-78-CA-126 entitled "John L. Fashing, et al vs. Judge T. Udell Moore, et al, is found at 489 F. Supp. 471 (W.D. Tex. 1980).

The per curiam opinion of the United States Court of Appeals for the Fifth Circuit in Cause No. 80-1107, likewise entitled, is reported at 631 F.2d 731 (1980).

STATEMENT OF JURISDICTION

The Supreme Court of the United States has jurisdiction of this issue as shown by the following:

1. The statutory provision believed to confer jurisdiction of this appeal in the Supreme Court of the United States is 28 U.S.C. §1254.

2. The judgment of the United States Court of Appeals for the Fifth Circuit as to which review is sought is dated and entered of record on October 31, 1980.

3. Appellants' Notice of Appeal is docketed on January 21, 1981.

4. The Supreme Court of the United States noted probable jurisdiction on June 1, 1981.

STATUTORY PROVISIONS CONSTRUED

The case involves construction of Article XVI, Section 65 of the Texas Constitution and Article III, Section 19 of the Texas Constitution. Both provisions are reproduced in the Jurisdictional Statement and are not again reproduced.

ISSUES ARGUED

ISSUE: The proper standard of Judicial Review to be applied to State Constitutional provisions which restrict candidacy by current officeholders.

ISSUE: Whether there is a rational basis for the Texas Constitutional provisions which restrict candidacy by current officeholders.

ISSUE: Whether appellees have standing to complain of Article III, Section 19 of the Texas Constitution prohibiting candidacy to the legislature during an officeholder's current term of office.

STATEMENT OF THE CASE

This suit was brought by the appellees in the United States District Court for the Western District of Texas seeking to challenge the constitutionality of Article III, Section 19, and Article XVI, Section 65, of the Constitution of the State of Texas. Some of the appellees were public officials who sought to run for higher office without resigning their present office as required by Article XVI, Section 65. The other appellees were voters who were desirous of voting for the officeholder appellees if they sought higher office.

The matter was heard on cross motions for summary judgment in the United States District Court for the Western District of Texas, El Paso division, on January 3, 1980, and the district court issued its judgment, memorandum opinion and order on January 23, 1980. On January 25, 1980, the district court granted the Respondents' request for an injunction. The State Petitioners filed their notice of appeal on February 4, 1980. Oral argument was heard in the United States Court of Appeals for the Fifth Circuit on October 29, 1980. The appellate court issued its opinion on October 31, 1980, which opinion is unpublished and adopts the opinion of the district court.

SUMMARY OF ARGUMENT

The first two issues relate to restrictions imposed upon candidates for public office by the Texas Constitution and the proper scope of judicial review to be accord-

ed such restrictions. The final issue relates to the hypothetical nature of the alleged application of these restrictions to appellees.

A right to candidacy is not a fundamental right. *Bullock v. Carter* 405 U.S. 134 (1972). However the right is a substantial one and requires a Balancing of the rights of the potential candidate with the interests of the state. *U.S. Civil Service Comm. v. Nat'l Assoc. of Letter Carriers* 413 U.S. 548 (1972); *Moriel v. Judiciary Commission of the State of Louisiana* 565 F.2d 295 (SH CR 1977) Article III, Section 19 and Article XVI, Section 65 meet the requirements of this standard by protecting the people of the state from abuse of office and even the appearance of a lack of integrity in its officeholders.

These provisions of the Texas Constitution do create a classification of officeholders, these classifications do not involve "suspect" groups. *Wisconsin v. Yoder* 406 U.S. 205 (1972). The classifictions created (legislative v. non-legislative offices, county level v. state-level offices) are rational and enjoy a presumption of validity. *McGovern v. Maryland* 366 U.S. 420 (1961).

Appellees have raised only a bare hypothetical thrust in attempting to create a controversy, particularly in the case of Article III, Section 19. None of the appellees attempted to seek higher office in violation of the restrictions in these provisions. The allegations before the court sees insufficient to create a case of controversy.

ARGUMENT

The sections of the Texas Constitution which are at issue in this cause provide as follows:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or

> any person holding a lucrative office under the United States, of this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST. art. 3, §19.
>
> ...if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State of the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year,such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX. CONST. art. 16§65.

Two lines of attack have been directed at these provisions by appellees. First, appellees claim that these sections impair their First, Fifth and Fourteenth Amendment fundamental rights to freedom of speech and freedom of association, to seek and hold elective office, and to vote. Second, they claim these sections create constitutionally impermissable classifications in violation of the Equal Protection Clause of the Fourteenth Amendment, the basis for the judgment entered by the courts below.

FIRST AND FIFTH AMENDMENT REVIEW

In considering the application of the fundamental rights protected by the First and Fifth Amendments to Article III, Section 19 and Article XVI, Section 65 of the Texas Constitution, an outline of the restrictions imposed by the state constitutional provisions is helpful.

Article III, Section 19 imposes a prohibition against holders of a lucrative office, such as appellees, becoming candidates for the state legislature before the final year of their four-year term. Article XVI, Section 65 imposes a restriction upon cadidacy by requiring an automatic resignation if certain officeholders, such as appellees, announce as candidates for another office before the final year of their four-year term. Neither of these provisions absolutely preclude candidacy. They preclude or restrict candidacy only prior to the last year of office.

These provisions are deeply rooted in Texas constitutional history. Article III, Section 19 has remained in the Texas Constitution virtually unchanged since 1836. Its origin can be traced to a 1348 petition from the House of Commons to the king "that no person summoned to Parliament should be either a taxer, collector or receiver or the fifteenth then granted." Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis (1978). When the present Texas constitution was drafted in 1876, its framers had witnessed abuses and excesses of power under a strong central state government during the Reconstruction Period. Consequently, they decentralized the state government, required almost all officers to be elected, and restricted their terms of office to two years. Shortly after most terms of office were extended to four years, the people of Texas, in 1958, adopted Article XVI, Section 65, in effect re-imposing a two year term on certain offices if the officeholder attempts to seek other office before the end of his term.

The appellee officeholders have a substantial interest in being free to seek other offices. The state constitutional provisions without question impose a restriction upon that freedom. However, a right to candidacy has never been declared to a fundamental right. *Bullock v. Carter* 405 U.S. 134,143,92 S.Ct. 849, 31 L.Ed.2d. 92

(1972). The impact upon the appellee voters is even less substantial. The impairment of potential voters interests in free expression and political association is not sufficient to warrant the strictest constitutional scrutiny. "Barriers standing in the path of potential candidates" do not automatically invoke the strict scrutiny standard. *Jenness v. Fortson* 403 U.S. 431 (1971).

The standard of review under the First and Fifth Amendments to statutes restricting candidacy is "in a state of flux and...reconciling the plethora of cases in this field is near to impossible." *Morial v. Judiciary Commission of the State of Louisiana*, 565 F.2d 295,308 (5th Cir. 1977, Judge Fay dissenting). However, *U.S. Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548,93 S.Ct. 2880, 37 L.Ed.2d 966 (1972) and *Morial, supra.* have outlined a process of evaluation for this case.

In *Letter Carriers* the court considered prohibitions upon political activities of federal employees imposed by the Hatch Act. These prohibitions included no formal positions in political parties, no substantial roles in partisan political campaigns, and no candidacy for office on partisan political tickets. The Court recognized the government's interest in regulating the conduct of its employees, and citing *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968) stated: "'The problem in any case is to arrive at a balance between the interests of the [employee] as a citizen in commenting upon matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs through its employees.' Although Congress is free to strike a different balance than it has, if it so choosed, we think the balance it has so far struck is sustainable by the obviously important interests sought to be served by the limitations...." *U.S. Civil*

Commission v. National Association of Letter Carriers, supra at 564.

The Court outlined the important interests of the government which justified these restrictions upon First and Fifth Amendment privileges. Among these were 1) employees of the executive branch should administer the law in accordance with the will of the legislative branch, 2) the laws should be executed without bias or favoritism, and 3) the government and its employees should avoid even the appearance of political justice. *Id.* at 564-565.

In *Moriel, supra,,* the U. S. Court of Appeals for the Fifth Circuit, *en banc,* considered the constitutionality of the "resign-to-run" rule embodied in the Louisiana Code of Judicial Ethics. In evaluating the restriction exerted upon First Amendment expressions by the "resign-to-run" rule, the Court articulated the following standard: ". . . restrictions on the partisan political activity of public employees and officers, where such activity contains substantial non-speech elements are constitutionally permissible if justified by a reasonable necessity to burden those activities to achieve a compelling public objective." [Citations omitted] *Id,* at 300. Based upon an analysis of the interests of the officeholder and the interests of the state, the provision was upheld.

The interests of the state which created "a reasonable necessity" in *Moriel* were 1) preventing abuse of office by a judge-candidate during a campaign, 2) preventing abuse of office by a losing judge-candidate who returned to the bench, 3) eliminating even the appearance of impropriety by judges both during and after the campaign.

The same important interests served by the Hatch Act restrictions upheld in *Letter Carriers* and the Louisiana "resign-to-run" rule upheld im *Moriel* are served

by Article III, Section 19 and Article XVI, Section 65, of the Texas Constitution. Article III, Section 19 insures that executive and administrative officers perform their duties faithfully and enforce the statutes and policies of the legislative branch without the temptation of frustrating those policies to improve their chances in a legislative contest during their term of office. If an unsuccessful legislative candidate were allowed to return to administrative duties, the likelihood that he would be less than diligent in executing the policies of the legislature is considerable. Likewise, Article XVI, Section 65 prevents abuse in office by candidates, prevents post-election abuse of office by losing candidates and prevents the appearance of impropriety in the election process.

The district court in its memorandum and order below, adopted by the U.S. Court of Appeals for the Fifth Circuit, did not hold that Article III, Section 19 or Article XVI, Section 65 unconstitutionally infringe upon First and Fifth Amendment rights, relying instead upon equal protection considerations. J.A. 15, 16. Indeed, the court agreed that Article XVI, Section 65 served "legitimate state interests." J.A. 15. Although the district court observed, in *dicta*, that the Texas restrictions are applied to a broader group of officeholders, these provisions are certainly more limited in scope and application than the Hatch Act which covers almost all federal employees.

Other cases have also addressed the issues herein. The federal resign-to-run rule was declared unconstitutional because, unlike Article XVI, Section 65, it effectively denied a certain council member *any* opportunity to run for mayor of the District of Columbia without resignation. *Barry v. Dist. of Columbia Board of Elections* 448 F.Supp. 1249 (1978), app.dismissed. 580 F2d 695 (1978). Even in *Barry* the court recognized that

its holding deviated from the precedents in this area and intimated that the result might have been different had the D.C. provisions had the weight of historical continuity behind them. "In *Letter Carriers, Broadrick, Morial* and *Magill* the court found impairments similar to those here to be outweighed by the countervailing governmental interests advanced by the challenged statute. Those cases involved statutory provisions of long standing and widespread acceptance, both of which naturally suggest strong, rational, and legitimate governmental interests." Id. at 10.

The United States District Court for the Middle District of Pennsylvania recently upheld a resign-to-run rule similar to Article XVI, Section 65. *Adams v. Supreme Court of Penn.* 502 F.Supp. 1282 (M.D. Pa. 1980). That court adopted a balancing standard, rather than the compelling state interest approach utilized by the lower court in this case. Other cases have also upheld resign-to-run provisions in Florida and New York. *Stack v. Adams,* 315 F.Supp. 1295 (N.D. Fl. 1970);*Signorelliv. Evans* 637 F.2d 853 (2nd Cir. 1980).

EQUAL PROTECTION CLAUSE

Appellees' second attack upon Article III, Section 19 and Article XVI, Section 65 is based upon an allegation that these provisions create constitutionally impermissible classifications in violation of the Equal Protection Clause of the Fourteenth Amendment. This allegation was the basis of the lower courts' judgment. J.A. 11-17.

Without question these Texas Constitutional provisions do create classification of officeholders. However, such a determination does not render them constitutionally infirm. This Court has traditionally applied a

deference to the determinations of legislative bodies, and, in this instance, the people of the state; also it has not required legislation to cure all ills at one time. *Railway Express Agency v. New York,* 336 U.S. 106 (1949). These provisions make no distinction on the basis of "suspect" groups such as race, color or religion; therefore, the "strict scrutiny" standard is not applicable. *Wisconsin v. Yoder,* 406 U.S. 205 (1972). These state constitutional sections should be accorded a presumption of validity and the burden of proof was upon the Appellees to establish no rational basis for these classifications. *McGowan v. Maryland,* 366 U.S. 420 (1961). In the alternative, the standard should be whether these classifications are reasonably necessary for the protection of the interests of the state. *Moriel,* supra. at 304. Under either standard, Article III, Section 19, and Article XVI, Section 65, have ample justification ad support.

Article III, Section 19, is a part of the legislative article of the Texas Constitution. It forms an integral part of a comprehensive separation of powers doctrine. The trial court found offensive the fact that no reciprocal prohibition is placed upon a legislator seeking executive or judicial positions. (J.A. 16) This overlooks the provisions of Article III, Section 18 which provide, in part "No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made in whole or in part, by either branch of the Legislature . . . ." These provisions serve as a check against potential abuse of office by legislators even as Article III, Section 19 prevents abuse by other officeholders.

A reciprocal prohibition is not required by the U.S. Constitution. The proper standard for determining an

equal protection challenge to Article III, Section 19, is whether the classification bears a rational relationship to the state interest being protected. *Foley v. Connelie,* 435 U.S. 291, 98 S.Ct. 1067, 55 L.Ed.2d 287 (1978).

To apply this test, we must first examine the classification established. It includes all elected state officials, including members of the legislature, all elected county officials, some, but not all, elected city officials, and officials of some other political subdivisions. State law establishes compensation for the state and county officials, while, for city officers, compensation is strictly at the option of the municipality. Most, but not all, other political subdivisions lack authority to pay their elected officials. Excluded from the classification are officials elected and appointed to nonlucrative positions. If the state has some rational justification for this scheme of classification, then the classification must be sustained against an equal protection attack.

It is undeniable that legislative office is of a character different from the administrative and judicial offices of the state or its subdivisions. The basic function of the legislature is to set policy. The function of officials in the other branches, to the contrary, is to administer the policies established by the legislature. It is clearly inimical to the American form of government, the basic concept of separation of powers, to permit an official with administrative duties to serve in the legislative body. This is also prohibited by the Tex. Const. Art. II §1 and Art. XVI §40.

The state could properly pick this alternative (absolute ineligibility), rather than some other restriction (e.g., a resign-to-run rule) because this goal also promoted other important state interests. For example, a prospective legislative candidacy by an adminstrative

official brings great pressure on that individual to compromise duty for the sake of political expendiency. Likewise, a candidate "feeling the water" even before he has "thrown his hat into the ring" has his attention diverted from his administrative duties while trying to decide whether to make the race. Texas' solution, to make such individuals ineligible to the legislature, deals with these problems as well.

Texas has chosen not to disqualify from eligibility to the legislature only those who hold non-lucrative office. All state and county officers hold lucrative offices. In the case of other local governmental bodies, the state has rationally assumed that, if the political subdivision found it necessary to compensate its officials, it was because the job was of sufficient import that it involved some substantial expenditure of time and effort in fulfilling the policies established by the legislature. On the other hand, positions which could be handled on a "volunteer" basis would not involve administrative discretion of a sufficient nature that the penalties of Art. III §19 were required.

Commencing our analysis of Art. XVI, Section 65 and its alleged conflict with the equal protection clause, we must first analyze the role that counties play in the overall scheme of government in Texas. Counties, are "created . . . for the convenience of the people and for purposes of local government, but for the exercise of essentially state powers as distinguished from municipal powers; and, with their conferred powers having the nature of duties rather than of privilege, existing as but agencies of the State for the effective discharge through local officers of the governmental obligations of the State." *Bexar County v. Linden,* 110 Tex. 339, 340, 220 S.W. 761, 761 (1920). They are distinguished from cities and other special purpose districts in that such districts exist primarily for local purposes, while the

county exists primarily as an agency of the State. It is therefore natural that the state constitution should differentiate between officers of the county and officers of other subdivisions. The offices covered by Art. XVI §65 all function at the county level. All county-level elected officials are covered. In addition, district attorneys are included as the primary prosecutor at the county level. These officers are not under any direct supervision by a higher state official and need the restrictions found in Article XVI, Section 65 to prevent abuse of office. In Article XVI, Section 65, there is one basic classification. County-level officials are treated differently from state level officials. This differentiation is justified.

Texas' basic policy calls for elections of local officials every two years. Art. XVI §30 Tex. Const. The reason for this policy is that frequent elections were felt to make government more responsive to the people. Art. XVI §65 is in derogation of this policy, and as such the provisions of the last paragraph thereof (the "resign-to-run" rule) are reasonably designed to substitute for that policy, in that a county-level officeholder at least could not abuse his office while he sought another office. The county-level offices are often the initial positions held by budding politicians. Since these offices are often stepping-stones, the temptation to seek higher office while safely occupying a county position is great. The people of Texas have guarded their state government from such abuse through Article XVI, Section 65.

With state officials, the situation is different. State officials fall into three categories. First, state administrative officers who hold the highest non-judicial elective offices in the state. This group would include the Governor, Lieutenant Governor, Attorney General, State Treasurer, Comptroller of Public Accounts, Commissioner of the General Land Office, Commissioner of

Agriculture, and Railroad Commissioners. With one exception, these officials are elected to four year terms all of which run concurrently. The three railroad commissioners are elected to 6 year terms, with one being elected every two years. The state can reasonably conclude that these office holders are so unlikely to seek another office that a resign-to-run rule is unnecessary for them. As a practical matter the only two offices these officials are likely to seek are U.S. Senate, and, possibly, the Presidency. Since four year terms were instituted for these officials in 1974, none has sought a different office in his mid-term.

The second group of state level officials not found with a "resign-to-run" rule are judicial officers, members of the Supreme Court, Court of Criminal Appeals, and the 14 Courts of Appeals (formerly Courts of Civil Appeals). In all cases, these judges are on appellate courts with three or more members. The absense of one judge during a campaign would not cripple the court's abililty to function during that period, since a quarom would still be present. Again, while there is some possibility of one of these officials seeking a different office at his mid-term, it is not great, and it is not fatal to the court system in any case since the court can hear a case even in the absence of one judge.

The third group of state-level officials not covered by resign-to-run rules are legislators. With them, the need for such a rule evaporates entirely. The legislature can, and normally does, function normally in the absence of some members, so that candidacy for another office cannot interfere with the legislature disposing of its business. Furthermore, the Texas legislature's regular sessions run only 140 days every two years, so that the chances of the legislature being in session during a mid-term campaign are neglible. Finally, 150 of the 181 members serve terms of two years; whenever they wish

to run for another state or county office, their term would be expiring anyway.

The trial court posed two questions in support of its holding that there is no reasonable basis for the classification of offices in Article XVI, Section 65: "Can a classification be upheld which allows a municipal court judge (not covered by Section 65) to run for district judge without resigning his office, while a justice of the peace (covered by Section 65) cannot? How can a rule be justified which permits a district judge to run for the Court of Civil Appeals without vacating his office, while a county court-at-law judge may not do so?" (J.A. 15) These questions were obviously posed rhetorically in an attempt to assign absurd results to Article XVI, Section 65. Even if their conclusions were completely accurate, these two instances would not justify the destruction of the entire resign-to-run plan. However, the conclusion in the first question is incorrect. If a municipal court judge is elected for a four year term, his situation, under Article XI, Section 11 of the Texas Constitution will be identical to that of a justice of the peace under Article XVI, Section 65. He must resign to run in the middle of his term. The second question concerns the differences between a county-level office (county court-at-law) and a state-level office (district judge) discussed previously. In addition there are many constitutional and statutory differences between the duties, jurisdiction, and qualifications of district judges and county court-at-law judges.

STANDING

Appellees assert that they are harmed because they will not announce their candidacy for various offices in future elections because of the provisions of Art. XVI §65, Tex.Const. In addition, Appellee Baca alleges that he will not become a candidate for District Judge, the State Legislature, or the United States Congress

because of the automatic resignation provisions of Art. XVI, Section 65 and because he is ineligible for the legislature under Art. III, Section 19. There are no other allegations regarding Art. III, Section 19.

The District Court, citing *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) for the proposition that "actual conduct which would invoke the operation of the sections under attack is not a prerequisite to challenging their validity"; (J.A. 13) ruled that Appellee's allegations, viewed in conjunction with the summary judgment proofs were sufficient to establish subject matter jurisdiction and standing. Such ruling was erroneous.

> "When the inevitability of the operation of a statute against certain individuals is patent, it is irrelevant to the existence of a justiciable controversy that there will be a time delay before the disputed provisions will come into effect." *Regional Rail Reorganization Act Cases*, 469 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320, 352 (1974).

The key phrase here is patent inevitability, for if operation of the challenged provision against an individual is hypothetical the case does not present a cognizable controversy. *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). *Steffel v. Thompson supra*, and other cases involving criminal prosecutions are not governed by this rule, since almost all criminal prosecutions are discretionary. *Regional Rail Reorganization Act Cases, supra* at 143 n.29, 45 S.Ct. at 358, 42 L.Ed.2d at 353. In other words, since the operation of a criminal statute against a violator is always contingent upon the prosecution bringing charges, a person may attack such a statute prior to its violation, and without showing that enforcement of the statute

against the person is inevitable. With respect to a civil statute, however, it must be inevitable that the allegedly unconstitutional provision will operate against a person before he has standing to attack the statute. This inevitability is not present in this case. Appellees have it within their power to create a case or controversy in this cause by filing to seek other offices at the mid-point of their terms. They could have done so in the past, and may yet do so in the future, but until they do, their claims are not cognizable in the courts.

Even if this Court should choose to disregard the distinction drawn in the *Regional Rail Reorganization Act Cases, supra,* and rule that mere allegations of a desire to come into future conflict with an alledgedly unconstitutional provision is sufficient to give rise to a case or controversy in civil as well as criminal cases, Appellees allegations are insufficient to make his Art. III, Section 19 claims cognizable. Appellees have alleged only that one of them *might* choose to run for one of several offices, including, *inter alia,* the state legislature. The court's power to pass on the constitutionality of a provision of the Texas Constitution ". . . arises only when the interest of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough." *United Public Workers v. Mitchell,* supra at 89, 67 S.Ct. at 524, 91 L.Ed. at 767. Appellees allegations of hypothetical wrongs which might occur only if he, at some time in the future, elects to pursue one of numerous possible paths, do not constitute a sufficient basis to establish a case or controversy. *Warth v. Seldin* 422 U.S. 590, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975).

CONCLUSION

For the reasons shown herein, the judgment of the court below should be reversed.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, James P. Allison, Assistant Attorney General of the State of Texas, do hereby certify that a true and correct copy of the foregoing Brief of Appellants has been served on all parties by placing same in the U.S. mail, certified, return receipt requested, to Mr. Raymond C. Caballero, Attorney for Appellees, 521 Texas Avenue, El Paso, Texas 79901, on the 14th day of August, 1981.

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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor
of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Fifth Circuit

APPELLEES' BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Summary.

This is an appeal by the State of Texas from a per curiam opinion of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of the United States District Court for the Western District of Texas that Article III, Section 19 (III-19), and the last paragraph of Article XVI, Section 65 (XVI-65), of the Texas Constitution were invalid under the equal protection clause of the fourteenth amendment to the United States Constitution (J.A. 17-19).

The Complaint and the Parties.

The Plaintiff-Appellees filed this action seeking injunctive and declaratory judgment relief from the threatened enforcement of the mentioned provisions of the Texas Constitution on grounds that they were violative of the first and

fourteenth amendments of the United States Constitution.

The Plaintiff-Appellees are the following persons:

1. John L. Fashing - Judge, County Court at Law No. 2, El Paso County.

2. Jose J. Baca - Justice of the Peace, Precinct No. 3, El Paso County.

3. Walter McGhee - Justice of the Peace, Precinct No. 2, El Paso County.

4. C. Johnny Ybarra - Constable, Justice of the Peace Court No. 3, El Paso County.

5. El Paso County voters.

   a. Owen Short.
   b. Donovan Webb.
   c. Pat Haggerty.
   d. William V. Fashing.
   e. Loretta Doerr.
   f. Phillip E. Bargman.
   g. Herbert Ehrlich.
   h. Michael T. Milligan.
   i. Arthur Abraham.
   j. Sam Snoddy.

6. Harris County voters.

   a. Bill Eubank.
   b. Jim Heathman.

7. Roger L. Moore - Hudspeth County voter.

8. Justice of the Peace Precinct No. 3 voters.

   a. Lupe Manago.
   b. Juan S. Martinez.
   c. Frank Escobar.
   d. Luisa Ybarra.

9. Justice of the Peace Precinct No. 2 voters.

   a. C. John Galvan.
   b. James L. Lee.
   c. George C. Johnson.

The local defendants were the following persons, and they will hereafter be referred to as county officials:

1. T. Udell Moore - County Judge, El Paso County.

2. Clyde C. Anderson - Commissioner, Commissioner's Court, El Paso County.

3. Richard Telles - Commissioner, Commissioner's Court, El Paso County.

4. Rogelio Sanchez - Commissioner, Commissioner's Court, El Paso County.

5. Chuck Mattox - Commissioner, Commissioner's Court, El Paso County.

6. Mary R. Haynes - Chairperson, El Paso County Democratic Executive Committee.

Defendants who are Appellants here are referred to hereafter as state officials and are the following:

1. William P. Clements - Governor, State of Texas.

2. Mark White - Attorney General, State of Texas.

3. George Strake - Secretary of State, State of Texas.

All the county officials agreed with Appellees that III-19 and XVI-65 were unconstitutional. Those officials are not Appellants in this appeal. The state officials alone contested the case and they were all represented by the Attorney General of Texas. The Appellees and the state officials filed cross motions for summary judgment (J.A. 13), agreeing that there were no contested issues of fact. Affidavits and questions and answers to interrogatories constituted the evidence adduced in the case, in addition to legal arguments.

Article III, Section 19.

Article III, Section 19, of the Texas Constitution makes ineligible as potential candidates to the Texas legislature certain public officials, even if they resign their position if the term of the position resigned extends into the legislative term sought. Article III, Section 19, provides as follows:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

Article III, Section 19, has always been part of the present Texas Constitution which was passed in 1876. It was also a part of the earlier 1845, 1861, 1866, and 1869 Constitutions. The interpretive commentary following III-19 in Vernon's Annotated Constitution of the State of Texas notes that the provision

was probably originally taken from a statute enacted by the British Parliament in 1701.

A legislator, on the other hand, is not ineligible to be a candidate for another office unless the office sought was either created or the emoluments of the office were increased during the legislative term served by the candidate. Article III, Section 18, Texas Constitution. The words "during the term for which he is elected or appointed" were added to the 1876 Constitution. It is that phrase which causes the problem; otherwise, the provision would merely prohibit dual office holding, a concept with which Appellees have no quarrel.

Article XVI, Section 65.

In 1954 the voters of Texas added Article XVI, Section 64, to the Texas Constitution in order to increase the terms of county and district officers from two to four years. At the same time

Section 65 was added so that the terms of some officers would be staggered and not all officers would be up for election at the same time. In 1958, XVI-65 was amended with the addition of the following paragraph, which is the only part of XVI-65 under attack in this case:

> Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

The XVI-65 resign-to-run rule applies to the following public officials:

a. District clerks
b. County clerks
c. County judges
d. Judges of county courts at law
e. Judges of county criminal courts

f. Judges of county probate courts
g. Judges of county domestic relations courts
h. County treasurers
i. Criminal district attorneys
j. County surveyors
k. Inspectors of hides and animals
l. County commissioners
m. Justices of the peace
n. Sheriffs
o. Assessors and collectors of taxes
p. District attorneys
q. County attorneys
r. Public weighers
s. Constables (J.A. 14-15).

Some of the elected officers to whom XVI-65 does not apply are as follows:

a. Governor
b. Lieutenant Governor
c. Comptroller of Public Accounts
d. Treasurer
e. Commissioner of the General Land Office
f. Attorney General
g. Railroad Commissioner
h. State legislators
i. Any justice or judge of all Texas appellate courts
j. District or criminal district courts
k. Family district courts
l. Juvenile courts
m. Corporation or municipal courts
n. Most mayors, city councilmen, school board members
o. Any judge or presiding officer of any special court (J.A. 15).

Article XVI, Section 65, provides that certain officials automatically

vacate their office if they announce as a candidate for any office other than the office they hold if they have more than one year remaining before the end of their term.

The Evidence Adduced.

The Appellees submitted the affidavits of 31 voters (R 148-213) in support of their motion for summary judgment (J.A. 1-2). The state did not controvert that evidence. In addition, affidavits were submitted by four Texas state district judges (R 158-164, 212-213), three former chairmen of the El Paso County Democratic Executive Committee (R 165-168, 177-178), a member of the Texas State Democratic Executive Committee (R 167-168), a former Democratic committeeman and treasurer of the Texas State Democratic Executive Committee (R 169-170), a former county judge of El Paso County, Texas, who in the past has been a member of the Texas legislature and

the Texas Board of Education (R 171-172), a former judge of the Municipal Court of El Paso, Texas, who was elected to the office of county commissioner while holding his judgeship without the burden of the resign-to-run rule (R 173-174), county clerk of El Paso County, Texas (R 175-176), a former county judge (R 177-178), and a judge of the Municipal Court of El Paso, Texas, who stands election for a two-year term in April of odd-numbered years (R 179-180). Each of the affidavits by the foregoing persons in part stated:

> I know of no Texas State interests that would justify or support the automatic resignation provision of Article XVI, Section 65, Texas Constitution, against the Plaintiffs' complaint, in light of the fact that such resign-to-run rule does not apply to all elected officials in Texas, and in particular to Texas State District Court Judges, Justices of the various Texas Appellate Courts and to Section 1, Article V, Texas Constitution, courts and the judges thereof that are not named in the resign-to-run rule.

A Fifth Texas District judge expressed his view of Article XVI, Section 65, in his summary judgment affidavit as follows:

> Without commenting on the issue of whether the provisions of the Texas Constitution that prohibit certain incumbent elected officials from becoming candidates for other political offices without forfeiting the office they then hold in unconstitutional under the United States Constitution, I submit that the Texas Constitution provision, because it tends to hinder the progress of able persons dedicated to public service while remaining employed as public servants is contrary to good principles of government. Such requirements tend to produce amateurism in public office. They also produce the tendency that all experienced political office holders have to be either personally wealthy or economically kept, because people of modest means who refuse to be supported by some political interest are unable to make a living while seeking advancement in their chosen profession of public service. (R 164).

Appellee Ybarra in his affidavit stated:

The only reason that I did not announce my candidacy for Justice of the Peace in the 1978 Democratic Primary Election against Plaintiff Baca and other candidates is that such an announcement of my candidacy would have caused my automatic resignation of my present office as mandated under Article XVI, Section 65, Texas Constitution. I would like to announce my candidacy for such Justice of the Peace Office in 1982, but will not do so once again because at my age of 59, and considering my financial condition, I could not afford to give up my Constable's office to run for Judgeship of the Court of which I am Constable. The reason I did not bring a suit such as this one to enable me to run in the May, 1978 Democratic Primary Election for Justice of the Peace is that I did not have the financial resources to do so and can only now be a plaintiff through the help of the other plaintiffs. Further, I did not become a candidate for Justice of the Peace in 1978 because I could not financially give up my office and seek said Judgeship without a job and I feel that with grass roots help I could have won the election for said Judgeship considering I had only 11 voting precincts to cover, but still even if I had won and been elected to that office, I would have no income and no financial resources to fall back upon until I took office as Justice of the Peace in January, 1979. (R 152).

By written interrogatory the state was asked to set out all the state interests that were furthered by III-19, and the state set out one: "Prevents conflicts of interest." (J.A. 4). When asked what state interest would support the distinction in treatment between a legislator and the holder of some other lucrative office, the state replied that a legislator had no conflict of interest once he or she left office (J.A. 11, No. 29), but the state did not explain what conflict of interest an office holder had once he or she resigned office to run for the legislature.

Appellees requested in interrogatories that Appellants list the differences between Section 65 office holders and non-Section 65 office holders that relate to the achievement of the objectives of the resign-to-run rule against only those office holders named in Section 65 (J.A. 4-6; Questions 3-8). In

answer, the Appellants stated that the legislature did not see fit to pass legislation comparable to Section 65 as to non-Section 65 office holders in 1949, and the question was not before the legislature in 1954 (Section 65 was added to the Texas Constitution in 1954, but the resign-to-run rule contained in the last sentence of Section 65 was not added until 1958). Appellants admitted in answers to interrogatories that the state objectives served by Section 65 are the same for non-Section 65 office holders as for Section 65 office holders (J.A. 6-7; Answers 9-15).

In reply to an interrogatory as to how Section 65 will insure the actual and perceived integrity of the Texas judiciary when that rule does not apply to all members of the Texas judiciary, the Appellants answered that legislature did not pass legislation comparable as to non-Section 65 members of the Texas

judiciary, and the question was not before the legislature in 1954 (J.A. 8; Questions-Answers 17-18). The Appellants gave similar answers to other interrogatories in connection with other objectives served by Section 65 (J.A. 9-11; Questions-Answers 20-21, 23-26).

Attached to this brief as an appendix are some materials explaining the court structure in the State of Texas and the jurisdiction of the various courts.

SUMMARY OF ARGUMENT

The right to candidacy, as part of the right of political expression and association, is an important if not basic political right entitled to protection under the first amendment to the United States Constitution. The right to candidacy is part of the right of a voter to express political ideas through a candidate who can carry out such political ideals. The right of candidacy is, furthermore, an important element in an individual's right to such expression. The right to candidacy is also the means by which most voters petition the government for redress of grievances. Any restriction on the right to candidacy must, therefore, be in furtherance of a vital or compelling state interest.

Article III, Section 19, and Article XVI, Section 65, of the Texas Constitution create classifications among the various

office holders involved, which classifications impose restrictions on the right of candidacy for some of the office holders and not for others. In order to be valid, the classifications must further some vital or compelling state interest, or at least there must be some rational basis for the classifications so created, depending on the standard of review employed.

Regardless of the standard of review used, the classifications created by III-19 and XVI-65 are invalid under the equal protection clause of the fourteenth amendment to the United States Constitution. The difference in treatment does not further the stated objectives of the state. There are other available and existing methods to achieve any stated objective. The provisions are so drafted that they unnecessarily burden important political rights.

ARGUMENT

I. ARTICLE III, SECTION 19, AND ARTICLE XVI, SECTION 65, VIOLATE THE FIRST AMENDMENT.

Although the courts below held III-19 and XVI-65 unconstitutional only under the fourteenth amendment equal protection clause, this Court may affirm that decision on another, separate basis. Dandridge v. Williams, 397 U.S. 471 (1970); and California Bankers Association v. Schultz, 416 U.S. 21, 71 (1974).

The first amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." The fourteenth amendment due process clause makes the first amendment applicable to the states. Gitlow v. New York, 268 U.S. 652 (1925); De Jong v.

Oregon, 299 U.S. 353 (1937); and Near v. Minnesota, 283 U.S. 697 (1931).

The provisions of the Texas Constitution in question run afoul of first amendment guarantees in several ways. Article XVI, Section 65, for example, provides that by the mere announcement of candidacy for any other office, a Section 65 office holder automatically resigns his or her own office. The effect of XVI-65 is to restrict the right of free speech of a Section 65 office holder. Under the Texas Election Code, Section 14.01, one may become a candidate for office by a "public announcement of a definite intent to run" or by the mere act of soliciting support. This ability to "test the waters" enjoyed by any other citizen may be exercised by a Section 65 office holder only by risking the automatic resignation of the office held.

It is beyond doubt that anyone has the right under the first amendment to voice criticism of an office holder. An office holder has the same right. Probably the most effective criticism of an office holder is the threat to oppose the office holder by supporting an opposing candidate. This would obviously include the right of the opposing candidate to voice an intent to run for office or to solicit support. A Section 65 office holder cannot speak freely of a desire to oppose another, because by the mere solicitation of support a candidacy has been declared. This constitutes a restriction on the right of free speech.

For example, both district and county attorneys in Texas are subject to XVI-65. In general the district attorney prosecutes felonies and the county attorney prosecutes misdemeanors. Suppose a county attorney wished to oppose an incumbent district attorney. The

incumbent could run and retain his or her office during that candidacy. The challenger, however, could not retain office and become a candidate if more than one year remained in his or her term. This is a severe restriction under the Texas Election Code. Under the Code one must file for an office no later than the first Monday in February of an election year, a date eleven months away from the actual start of the term of office. So even if the county attorney's own term of office expired at the end of 1982, for example, and he or she wished to run for the district attorney's term which was to commence on January 1, 1983, the county attorney could only test the waters between January 1, 1982, and the first Monday in February of 1982, a period of no more than 37 days. Any active solicitation of support prior to January 1 of the election year would cause the

county attorney to lose the office automatically.

Article XVI, Section 65, effectively might keep the county attorney out of the race entirely, and it certainly would curtail that person's right to speak freely prior to January 1 of the election year.

This curtailment of a possible candidate's ability to "test the waters," an essential, though informal, part of the political process, is unnecessary. Many persons contemplate political office; few actually file to run. Article XVI, Section 65, limits even a tentative inquiry by a XVI-65 office holder who contemplates running for another office, since the price to be paid for a mere inquiry is potentially so devastating.

Although the first amendment is phrased as an absolute prohibition, this Court has approved some limited restrictions on the right of some persons

to express political beliefs and to engage in political activities because of other, overriding governmental objectives. U.S. Civil Service Commission v. National Association of Letter Carriers, 413 U.S. 548 (1973); and Broadrick v. Oklahoma, 413 U.S. 601 (1973).

The first amendment right to petition a government for redress of grievances is also involved in this case under both III-19 and XVI-65. What more meaningful way does one have to petition for redress than to become a candidate? Are not most petitions presented through an elected representative? Access to the government is usually gained through a representative. An office holder may be representing a viewpoint espoused by others, but also the representative is being an advocate for his or her own personal views, which views might coincidentally be shared with others. Therefore, a candidacy for public office

can be the most effective means of expressing a political belief or in presenting a grievance to the government. The restriction of that right by limiting access to the ballot in fact restricts core first amendment values.

Article III-19 makes ineligible for the Texas legislature virtually any office holder whose term extends into the legislative term sought. For example, assume Appellee Jose Baca, a justice of the peace holding a four-year term (1978-1982), decided midway through his term to run for the state legislature in 1980. Even if Judge Baca resigned his office, eliminating even the possibility of a conflict of interest, III-19 makes him absolutely ineligible to run.

Article III-19 applies to any holder of an office for pay--for example, mayors and members of city councils. In Texas, many if not all municipal elections are held in odd years. Again, assuming a

mayor holding office from 1981 to 1983, for example, desired to run for the legislature in 1982, even if he or she resigned the office, III-19 would make them ineligible.

In effect, the legislature has removed as possible challengers virtually every office holder in Texas while imposing on a legislator no reciprocal prohibition.

The state argues that it is not a real burden on a legislator to run for another office, since they are only regularly in session for five months every odd year. Odd years are when municipal elections are held, so it would pose a burden for a legislator to run for municipal office, yet they can do so freely.

II. THE RIGHT TO BE A CANDIDATE IS A FUNDAMENTAL RIGHT UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The first amendment expressly prohibits any restriction on a person's right to speak, assemble, or to petition the government for a redress of grievances. Those are considered "core" or fundamental first amendment rights. The right to vote is considered to be part of those rights. Williams v. Rhodes, 393 U.S. 23 (1968); and Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979).

Although this Court has never expressly held the right of candidacy to be one of the core first amendment rights, Bullock v. Carter, 405 U.S. 134 (1972), we respectfully submit that the right to be a candidate is a fundamental right. See, Mancuso v. Taft, 476 F.2d 187 (1st Cir. 1973). See also, The Constitutionality of

Resign-to-Run Statutes: Morial v. Judiciary Commission of Louisiana, 53 St. John's Law Review 571 (1979); Ahrens and Hauserman, Fundamental Election Rights: Association, Voting and Candidacy, 14 Valparaiso Law Review 465 (1980); and Gordon, The Constitutional Right to Candidacy, 25 Kansas Law Review 545 (1977).

In Illinois State Board of Elections v. Socialist Workers Party, supra, at p. 184, this Court stated:

> Access restrictions [to the ballot] also implicate the right to vote because, absent recourse to referendums, 'voters can assert their preferences only through candidates or parties or both.' Lubin v. Panish . . . . By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. And for reasons too self-evident to warrant amplification here, we have often reiterated that voting is of the most fundamental significance under our constitutional structure.

This Court has found it difficult to separate the right of a voter to express a political preference and the right of an individual to be a candidate. In Lubin v. Panish, 415 U.S. 709 (1974), this Court held:

> The interests involved are not merely those of parties and individual candidates; the voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance. The right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the right of the voters.

So, under current law, while the right to candidacy has not been classified as a fundamental right, no one has been able to draw any meaningful distinction between admittedly basic political rights and the right to candidacy. It is respectfully suggested that in such a close case the Court should indulge in a presumption which would accord as much protection as possible to a right.

III. UNDER ANY STANDARD OF REVIEW, ARTICLE III, SECTION 19, AND ARTICLE XVI, SECTION 65, ARE INVALID UNDER THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Inasmuch as III-19 and XVI-65 do impose some burdens on the right of candidacy and because the right of candidacy should be a fundamental right, the standard of review should be that set out by the Court in Buckley v. Valeo, 424 U.S. 1 (1976). In Buckley v. Valeo, this Court stated:

> In several situations concerning the electoral process, the principle has been developed that restrictions on access to the electoral process must survive exacting scrutiny. The restriction can be sustained only if it furthers a 'vital' governmental interest, American Party of Texas v. White, 415 U.S. 767, 780-781, 94 S.Ct. 1296, 1305-1306, 39 L.Ed.2d 744 (1974), that is 'achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally

> important interest in the continued availability of political opportunity.' 424 U.S. at p. 94.

Under the first amendment, III-19 places a substantial burden on the right of candidacy. Concurring in McDaniel v. Raty, 435 U.S. 618 (1978), Justice White wrote:

> Our cases have recognized the importance of the right of an individual to seek elective office and accordingly have afforded careful scrutiny to regulations burdening that right. 435 U.S. at p. 644.

The state interest asserted is that III-19 prevents conflicts of interest. In the first place, what is the nature of the conflict of interest asserted? If it is that a candidate would misuse the facilities of the office presently held while running for the legislature, does not the incumbent legislator suffer from the same conflict? In any event, even if a candidate resigned so as to remove even the possibility of a conflict of interest,

III-19 would still prevent the candidacy.[1] The prohibition, therefore, is too broad for the objective sought, even assuming that the objective were legitimate. The unnecessary restriction on protected activities makes the statutes overbroad and therefore invalid under the first and fourteenth amendments to the U. S. Constitution.

In the case of XVI-65 the state asserts that Section 65 prevents an office holder from misusing an office while running for another office. Perhaps it is in preventing such a potential abuse that the state finds a compelling objective. The problem is that many office holders

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[1]Moreover, the Texas Penal Code discourages misuse or abuse of office by making such conduct punishable as a crime. Chapter 39, Texas Penal Code. Other injudicious conduct not rising to the level of a crime can be made the subject of disciplinary action under the Code of Judicial Conduct of the State of Texas.

are exempt from the restrictions of XVI-65 while subject to the same supposed temptations and conflicts.

To be compelling, to use a dictionary definition, means "to urge irresistibly." Can an objective be so compelling and irresistible, yet never be applied to another group which ostensibly would be subject to the same pressures? The record discloses no effort or movement since 1958 to apply the stated objective to non-Section 65 office holders.

Assuming for the moment that the objectives advanced by the state are vital or compelling, none of those objectives supports the classification created by XVI-65. "When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest." Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. at p. 184.

There must be a substantial justification for the difference in treatment. In Braden, The Constitution of the State of Texas: An Annotated and Comparative Analysis[2] (1978), p. 813, a publication co-edited by one of the attorneys for the state here, the following was stated regarding the XVI-65 proviso:

> The proviso discriminates, with no apparent legitimate reason, against elected precinct, county, and district officials. (See also Art. XI, Sec. 11, which contains an identical proviso applicable to municipal officials.) If it is thought generally that office-holders should forfeit their positions when they announce for other office, the provision should apply to members of the legislature and statewide elected officials as well as to those named in this section.
>
> If the officeholder waits until the last year of his term to announce for the new office, his old office is not forfeited.

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[2]The state cites this publication at p. 6 of its brief.

> This one-year period might be unrealistic if applied to statewide and federal offices, in view of the trend in recent years toward longer campaigns for those offices.

Those authors were unable to find any "legitimate" reason for the classification. In its brief on the merits in this case the state makes the chauvinistic assertion that local or county officials are for some reason more susceptible to temptation to which state office holders are also exposed. One sitting in Austin is somehow made wiser and more honest than another living and working in El Paso, Ft. Stockton, or Amarillo. The interests put forth by the state largely boil down to the statement that provincials are less honest.[3] We submit that the reason for the statute was mere oversight and not the

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[3]In fact XVI-65 does not even lend itself to the clean cut local vs. statewide distinction made because some local offices are not covered by XVI-65,

asserted objective. This Court may reject an asserted reason for a law "if it could not have been a goal of the legislation . . ."[4] Michael M. v. Superior Court of Sonoma County, 101 S.Ct. 1200, 1205 (1981).

The state argues at page 15 of its brief that XVI-65 should not be applicable to statewide offices such as Attorney General because those persons are so unlikely to run for anything but a federal office. A correction is in order. Former Appellee and Attorney General, John Hill, ran for Governor in 1978 and lost. He was

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for example, district judges and municipal court judges which have greater and lesser jurisdiction, respectively, than county courts at law or justice of the peace courts.

[4]The position that the classification constitutes a bill of attainder of the local officials is more fully discussed in the brief filed by the Amicus Curiae County Court at Law Judges Association of the State of Texas. Appellees adopt those arguments here.

able to run for the Governorship long before January 1, 1978, because XVI-65 was not applicable to him. One of the problems with XVI-65 is that even if one intends to run for a different office at the end of a term, XVI-65 gives one only 37 days to test the waters, an unreasonable restriction.

The state also raises for the first time in this brief numerous supposed state interests which were never mentioned in the lower courts and which were not developed in the record. Those interests should not be raised at this late date when they could have been explored below. Quilloin v. Wolcott, 434 U.S. 246 (1978), N. 13.

Although the rights of voters to be heard "is at the core of the right of political association," Williams v. Rhodes, 393 U.S. 23, 39-40 (1968) (concurring opinion), the classification of such rights is not subject to a "neat

separation." Bullock v. Carter, 405 U.S. 134, 142-143 (1972). Even if we are not dealing with core or fundamental rights, we are undoubtedly dealing with important rights. So in the application of some less stringent standard of review the state must still demonstrate whether the burdens or restrictions imposed on the important right to be a candidate imposed by III-19 and XVI-65 have some rational relation to a legitimate governmental interest. Rostker v. Goldberg, 49 L.W. 4798, 4801 (1981); and U. S. Railroad Retirement Board v. Fritz, 101 S.Ct. 453 (1980).

It was under this standard of review that the district court in this case found that the XVI-65 "classification fails to serve any proper governmental interest, and it is constitutionally impermissible." (J.A. 18). Nor did the district court find any reasonable relation between the

III-19 restriction and a legitimate governmental objective (J.A. 19).

In attempting to decide cases under this two tier approach, courts have recognized that the initial determination of fundamental or non-fundamental often decided the case. This Court is becoming increasingly uncomfortable about deciding these cases on the basis of a semantical twist. In Rostker v. Goldberg, supra, at p. 4802, the Court wrote:

> We do not think that the substantive guarantee of due process or certainty in the law will be advanced by any further 'refinement' in the applicable tests as suggested by the Government. Announced degrees of 'deference' to legislative judgments, just as levels of 'scrutiny' which this Court announces that it applies to particular classifications made by a legislative body, may all too readily become facile abstractions used to justify a result.

See also, Beal v. Doe, 432 U.S. 438, 457 (1977) (dissent by Justice Marshall); and Illinois State Board of Elections v.

Socialist Workers Party, supra, at p. 188 (concurrence by Justice Blackmun).

The en banc decision in Morial v. Judiciary Commission of the State of Louisiana, 565 F.2d 295 (5th Cir. 1977), based on this Court's U. S. Civil Service Commission v. National Association of Letter Carriers, supra, presented a practical standard of review for this type of case. The Court stated:

> The standard to be applied in any case is a function of the severity of impairment of first amendment interests. As the burden comes closer to impairing core first amendment values, e.g. the right to hold particular political views, Elrod v. Burns, supra, 427 U.S. at 355, 96 S.Ct. at 2681, or impairs some given first amendment value more substantially, Buckley v. Valeo, supra, 424 U.S. at 19-23, 96 S.Ct. at 635-36, the requisite closeness of fit of means and end increases accordingly. The teaching of Letter Carriers, considered as a part of the jurisprudence of the first amendment and not some anomalous class of 'Hatch Act cases,' is that restrictions on the partisan political activity of public employees and officers,

> where such activity contains substantial non-speech elements, see United States v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), are constitutionally permissible if justified by a reasonable necessity, see Bullock v. Carter, 405 U.S. 134, 144, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972), to burden those activities to achieve a compelling public objective. 565 F.2d at p. 300.[5]

Under the rule in Morial there is no necessity in attempting to pigeonhole the important right here as fundamental or nonfundamental. The importance of the rights should, of course, be taken into consideration. The nature of the

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[5]The Court of Appeals noted the test it proposed was different from the Court's and stated:

> We recognize, of course, that the Supreme Court has not articulated the applicable test in precisely this way. Nonetheless, the Court's reasoning and its holdings in cases closely analogous to that at bar support the appropriateness of a variable standard of scrutiny dependent upon the character and substantiality of the impairment of first amendment interests. 565 F.2d at p. 300, fn. 5.

political rights involved in this case has already been discussed above. While this Court does not expect perfect legislation or constitutional revisions to result from imperfect political processes, under the test, tolerance for imperfection decreases as the nature of the right becomes more basic. The fit of the regulation to the end sought to be achieved must also be closer as the burdens on the right involved become more onerous. Another factor which is obviously involved is whether there are available to the state less restrictive means of achieving the same objectives.

With respect to this last point, the state has not sought to demonstrate that the admitted imperfection in the provisions involved here are necessary because no other means were available. In fact, it is apparent that not only are other means available, some are in place and working. For example, the

Constitution already prohibits dual office holding under Article XVI, Section 40, which provides for the automatic relinquishment of the first office held upon the acceptance and qualification of the second office. Centeno v. Inselmann, 519 S.W.2d 889 (Tex. Civ. App. 1975). The provisions of the Code of Judicial Conduct and the Texas Penal Code have already been noted.

The burden imposed upon potential candidates by III-19 is obvious and is substantial, the total disqualification for an office if one holds another office. The state has not attempted to state so much as one point to support the reasonableness of III-19 in the case of a person who wishes to run for the legislature and has resigned an office to do so. With respect to those persons who hold office while being candidates for the legislature, XVI-65 would cause most of them to lose their office automatically.

Even if XVI-65 were held invalid, the argument of the state that an unsuccessful legislative candidate might use the powers of an executive or judicial office to punish supporters of an opponent does not apply in the case of office holders who are legislators of sorts themselves, such as members of city councils or those many office holders covered under XVI-65, like constables and county commissioners who are neither executive nor judicial.

The price of forced relinquishment of an office held is a high price to pay "for tossing one's hat in the ring." Morial, supra, at p. 301. It is a particularly burdensome price to pay for those who are economically less fortunate and who have no other means of support while running for another office. As such, XVI-65 creates a suspect classification which is based on economic means and which discriminates against the poor and in favor of the wealthy. Appellee Ybarra has

testified that he would be a candidate for the office of justice of the peace but cannot afford to lose his office in the interim period (R 152). See also the testimony of Judge Sam Callan, supra at p. 11.

Article III, Section 19, and XVI-65 fail under the Letter Carriers-Morial standard on all counts. They do not constitute the least restrictive means available to the state in order to minimize the burdens on protected rights. They are not supported by legitimate state objectives. They are not drafted in such a manner to restrict their effect as close as possible to the objectives sought, even assuming that those objectives were reasonable and legitimate. In balancing the interests sought to be achieved against the restrictions on constitutionally protected activities, the burdens placed are too great for the benefits expected.

IV. APPELLEES HAVE STANDING TO BRING THIS ACTION.

The state argues that Appellees do not have standing in this case, claiming that the mere possibility of the enforcement of III-19 and XVI-65 is insufficient and that there must be "patent inevitability" and not merely a hypothetical threat. In this case the threat is not merely hypothetical, for at least two candidates, Rose B. Spector and Raymond Wietzel, Judges of the County Courts at Law Numbers 5 and 3, respectively, of Bexar County, Texas, apparently filed for office under the protection of the ruling of the district court here. They attempted to intervene in this action after the district court issued the judgment, but their motion to do so was denied.

Even if no one sought office so as to trigger the application of III-19 and XVI-65, Appellees have standing to

challenge the laws. Preconduct challenges to laws under 42 U.S.C. Section 1983 have been recognized for some time in order to protect important rights. Doran v. Salem Inn, Inc., 422 U.S. 922 (1975); Steffel v. Thompson, 415 U.S. 452 (1974); and Younger v. Harris, 401 U.S. 37 (1971).

CONCLUSION

For all the foregoing reasons, Appellees urge this Court to affirm the decision and judgment of the United States Court of Appeals for the Fifth Circuit. In the event of the affirmance of the decision below, Appellees would request a remand of the case to the district court for a determination of appropriate attorneys' fees in this case.

Respectfully submitted,

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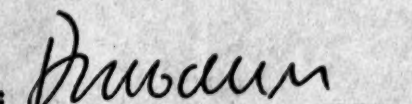
By: 
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CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing brief were mailed to James Allison, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas, 78711; and to Gary Ahrens, Texas Tech School of Law, Lubbock, Texas.

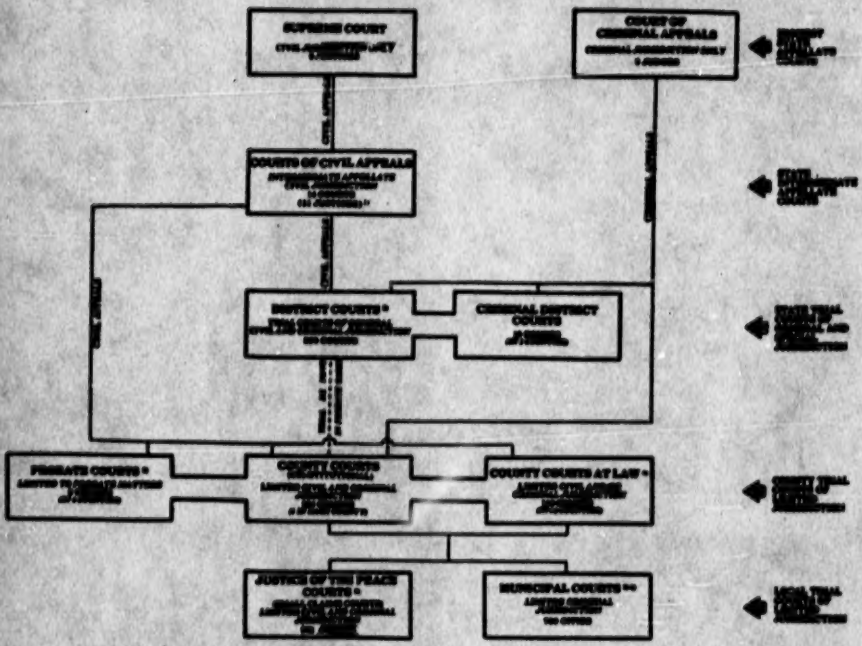
RAYMOND C. CABALLERO

APPENDIX

JUDICIAL BRANCH
OF
TEXAS

THE COURT STRUCTURE OF TEXAS

JANUARY 1, 1981



PREPARED BY
THE OFFICE OF COURT ADMINISTRATION
P. O. BOX 12066
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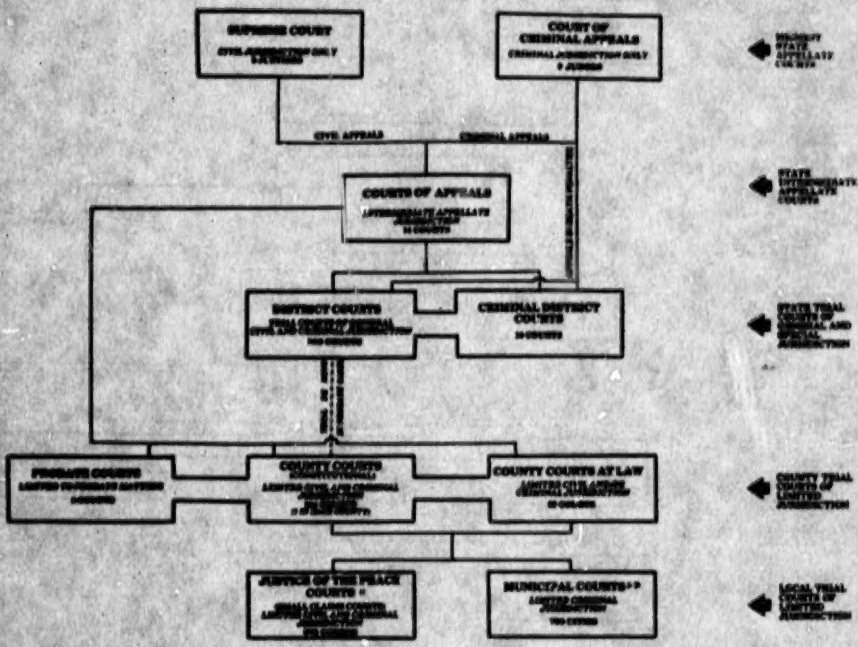
512/475-3450

THE COURT STRUCTURE OF TEXAS

SEPTEMBER 1, 1961*



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THE COURT STRUCTURE OF TEXAS
JANUARY 1, 1981
Descriptive Outline

The present court structure of Texas, established by the constitutional amendment of 1891, provides for a Supreme Court which is the highest state appellate court in civil matters and a Court of Criminal Appeals which is the highest state appellate court in criminal matters. It has fourteen intermediate courts of civil appeals. There is no intermediate court for criminal appeals from trial courts, such appeals going directly from the trial courts to the Court of Criminal Appeals in Austin.*

The state trial courts of general jurisdiction are the district courts, which in some metropolitan areas have been established as courts having primarily civil, criminal, domestic relations, or juvenile jurisdiction. It should be noted that the geographical jurisdiction of each individual district court is established by the specific statute creating that court, and such jurisdiction does not necessarily correspond to any previously established court. Each court has one judge.

In addition to the above state courts, the Texas Constitution provides for a county court in each county presided over by the county judge. To relieve the docket congestion of the single constitutional county courts the legislature has established probate courts and county courts at law in certain counties.

The Texas Constitution also provides for justice of the peace courts in each county. Since 1953, these justice courts also serve as small claims courts.

The legislature has created by statute municipal courts in each incorporated city. These courts have concurrent criminal jurisdiction with the justice of the peace courts limited to the geographic confines of the municipality.

Trial in the justice of the peace courts and most municipal courts is not of record, and appeals therefrom are on trial de novo to the county court except in those counties having statutory county courts at law or where by statute the district court has assumed portions of the county court's jurisdiction.

The state provides full funding for the Supreme Court, the Court of Criminal Appeals, and the Austin Court of Appeals. It provides a base salary for the appellate and district judges of this state. Certain counties supplement this base salary for district and intermediate appellate judges. Counties pay the costs of "constitutional" county courts, county courts at law, justices of the peace, and operating costs of district courts except the judge's basic salary. The cities finance the municipal courts.

H.B. 338 of the 66th Legislature, the general appropriations bill, appropriated $26,347,393 in general revenue funds for the operation of the judiciary in fiscal year 1980. This represents less than one percent of the $3,740,831,069 total general revenue funds appropriated.

SUPREME COURT(1)

1. Jurisdiction: The Supreme Court of Texas has state-wide final appellate jurisdiction in civil and juvenile cases, and has general responsibility for the efficient operation of the Texas Judicial System. It is empowered to make and enforce all necessary rules of civil practice and procedure for the Judicial System, and to promulgate rules of administration to provide for the efficient administration of justice in the State. This Court has original jurisdiction to issue writs and to conduct proceedings for the involuntary retirement or removal of all judges in the State.

   In addition to its major responsibilities of hearing oral arguments, deciding cases appealed to it, and writing opinions, the Supreme Court has many administrative duties placed upon it by the Legislature to ensure the efficient administration of justice by the Texas Judicial System. These duties include:

   - Promulgating the Rules of Civil Procedure for the Texas Judicial System. (Article 1731a)
   - Promulgating Rules of Administration for the Texas Judicial System. (Article 1738b)
   - Equalizing the dockets between the 14 courts of civil appeals. (Article 1738)
   - Promulgating the Rules of Procedure for the Commission on Judicial Conduct and disciplining or removing judges from office. (Article V, sec. 1a, Tex. Const.)
   - Supervising the operations of the State Bar of Texas and the rules and regulations for the admission, discipline, supervision, and disbarment of lawyers, and approving the law schools of the State. (Articles 304, 306, 302a-1)
   - Promulgating disciplinary rules for the Texas Prosecutor's Coordinating Council. (Article 332d)
   - Promulgating the rules for the operations

*[illegible]

of the Texas Court Reporters Committee and the disciplinary rules enforced by this Committee. (Article 2390b)

The Chief Justice has the responsibility of:
- Conferring with the Presiding Judges of the Administrative Judicial Districts to promote the expedient dispatch of judicial business. (Article 200a)
- Assigning of judges between Administrative Judicial Districts to promote the expedient dispatch of judicial business. (Article 200a)
- Finally, the Chief Justice is required to deliver a "State of the Judiciary" message at the commencement of each regular session of the Legislature. (Article 3428h)

2. Seat: Austin
3. Membership:
   a. Number: One Chief Justice and 8 Justices
   b. Selection: Partisan, state-wide election. Vacancies between elections filled by gubernatorial appointment with advice and consent of the Senate.
   c. Qualifications: Citizen of the United States and of Texas; age 35; a practicing lawyer, or lawyer and judge of a court of record together for at least ten years.
   d. Salaries:

Chief Justice:	
eff. 9-1-80	$60,100
eff. 3-1-81	$63,105
Justices:	
eff. 9-1-80	$59,600
eff. 3-1-81	$62,640

   e. Term: Six year, overlapping terms.

COURT OF CRIMINAL APPEALS(1)
1. Jurisdiction: The Court of Criminal Appeals has state-wide final appellate jurisdiction in criminal cases and the power to issue writs.
2. Seat: Austin
3. Membership:
   a. Number: One Presiding Judge and 8 other judges.
   b. Selection:
      (1) Presiding Judge and judges are elected in partisan state-wide elections. Vacancies between elections are filled by gubernatorial appointment with advice and consent of the Senate.
      (2) The Court has authority to appoint commissioners.
   c. Qualifications: Citizen of the United States and of Texas; age 35; a practicing lawyer, or lawyer and judge of a court of record together for at least ten years.
   d. Salaries:

Presiding Judge:	
eff. 9-1-80	$60,100
eff. 3-1-81	$63,105
Judges:	
eff. 9-1-80	$59,600
eff. 3-1-81	$62,640

   e. Term: Six year, overlapping terms.

COURTS OF CIVIL APPEALS(14)*
1. Jurisdiction: Intermediate appellate jurisdiction in civil cases only from trial courts in each respective geographic district, called "Supreme Judicial Districts." Limited original writ jurisdiction.
2. Seats: 1st District, Houston
   2nd District, Fort Worth
   3rd District, Austin
   4th District, San Antonio
   5th District, Dallas
   6th District, Texarkana
   7th District, Amarillo
   8th District, El Paso
   9th District, Beaumont
   10th District, Waco
   11th District, Eastland
   12th District, Tyler
   13th District, Corpus Christi
   14th District, Houston
3. Membership:
   a. Number: One Chief Justice and two associate justices per court, except the 1st and 14th (Houston), and 5th (Dallas), which each have five associate justices, for a total of 31 justices state-wide.
   b. Selection: Partisan elections from supreme judicial districts. Vacancies between elections filled by gubernatorial appointment with advice and consent of the Senate.
   c. Qualifications: Citizen of the United States and of Texas; age 35; a practicing lawyer, or lawyer and judge of a court of record together for at least ten years.
   d. Salaries paid by the State:

Chief Justices:	
eff. 9-1-80	$60,700
eff. 3-1-81	$63,266
Associate Justices:	
eff. 9-1-80	$60,200
eff. 3-1-81	$62,760

*[illegible]

Supplements may be paid by the counties in the districts, not to exceed $8,000 per year and total salary must be $1,000 less than received by Supreme Court justices ($300 in the case of chief justices).

e. Term: Six years.

DISTRICT COURTS(310)

1. Jurisdiction: There are 310 separate district courts, identified by separate numbers, each having its own judge and geographical jurisdiction. In a number of areas, the geographical jurisdiction of two or more district courts is overlapping.

District courts are trial courts of general jurisdiction, having original jurisdiction in all criminal cases of the grade of felony, cases of divorce, title to land, contested elections, and all civil matters wherein the amount in controversy is $3,000 or more and concurrent jurisdiction with statutory county courts at law in cases of at least $500 and not exceeding $5,000. (In the counties which have no statutory county courts at law, district courts have exclusive original jurisdiction in civil cases wherein the amount in controversy is $1,000 or more and concurrent jurisdiction with the county court in cases of at least $500 and not exceeding $1,000.)

The district courts have original and appellate jurisdiction in probate matters and general supervisory control over commissioners court. In addition, these courts have general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or by the Constitution, and have the power to issue writs of habeas corpus, mandamus, injunction, certiorari, sequestration, attachments, garnishment, and all writs necessary to enforce their jurisdiction.

Most district courts exercise both criminal and civil jurisdiction, but in the metropolitan areas there is a tendency for the courts to specialize in either civil, criminal or family law cases. In some cases, the courts which have criminal jurisdiction exclusively are designated criminal district courts.

A limited number of district courts also exercise the subject-matter jurisdiction normally exercised by county courts.

Appeals from judgments of the district courts are to the Court of Criminal Appeals in criminal cases and to the Courts of Civil Appeals in civil cases.*

2. Seats: At the county seat of each county included in each respective geographical district.

3. Membership:

a. Number: One judge per court.

b. Selection: Partisan district-wide elections. Vacancies between elections filled by gubernatorial appointment with advice and consent of the Senate.

c. Qualifications: Citizen of the United States and of Texas; resident of the district for two years; age 25; licensed to practice law in Texas and a practicing lawyer or judge for four years.

d. Salaries paid by the State:

eff. 9-1-80 $42,500
eff. 9-1-81 $44,625

Supplements authorized by statute may be paid by counties, ranging to $17,000 per year. Total salary must be $1,000 less than received by associate justices of the Court of Civil Appeals of the Supreme Judicial District.

e. Term: Four years.

"CONSTITUTIONAL" COUNTY COURTS(254)

1. Jurisdiction: The Texas Constitution provides that there shall be a county court in each county, but not all 254 courts perform judicial functions. The county court has civil, criminal, original and appellate jurisdiction. It has concurrent legal authority with justice of the peace courts in civil cases when the contested amount is $200-$500, and it has concurrent civil jurisdiction with the district court in cases when the amount exceeds $500 but is less than $1,000. The county court also usually has general control over probate cases. In criminal cases, the county court has exclusive original jurisdiction over all misdemeanors when the fine to be imposed exceeds $200 or when a jail sentence may be imposed.

Unless expressly provided by law, the county court does not have criminal jurisdiction in any county where a criminal district court exists. Decisions from the municipal and justice courts may be appealed to the county court, and the appeal takes the form of a completely new trial (trial de novo). Original and appellate judgments of the county court may be appealed to the Court of Civil Appeals in civil cases and to the Court of Criminal Appeals in criminal cases.*

Geographical jurisdiction: County-wide.

2. Seats: County seat of county of jurisdiction.

*[illegible]

3. Membership:
   a. Number: One judge per court.
   b. Selection: County-wide partisan election with vacancies between elections filled by county commissioners.
   c. Qualifications: "Shall be well-informed in the law of the State." (Law license unnecessary).
   d. Salaries: Paid entirely by the county. Highly variable.
   e. Term: Four years.

The commissioners court is not a judicial entity; rather it is the governing body of the county. It is presided over by the constitutional county judge and includes four elected commissioners. Although it performs no judicial duties, the commissioners court can issue writs and contempt citations.

COUNTY COURTS AT LAW(116)

1. Jurisdiction: The Legislature has the authority to create special county courts. One hundred eighteen of these statutory courts have been created in forty-eight counties, primarily in metropolitan areas, to relieve the constitutional county judge of all or part of his judicial duties. The legal jurisdiction of the special county courts varies considerably according to the statute under which they are created. As the varied names suggest, some of these courts are intended to exercise in practice subject-matter jurisdiction in only limited fields, such as civil, criminal, probate or appellate (from justice courts or municipal courts); but the names do not always disclose their complete functions. In general, the concurrent civil jurisdiction of these statutory courts with the district court is higher than constitutional county courts.

   Geographical Jurisdiction: County-wide.

Anderson(1) — County Court at Law
Bell(2) — County Court at Law No. 1; County Court at Law No. 2
Bexar(5) — County Court at Law No. 1; County Court at Law No. 2; County Court at Law No. 3; County Court at Law No. 4; County Court at Law No. 5
Brazoria(2) — County Court at Law No. 1; County Court at Law No. 2
Brazos(1) — County Court at Law
Cameron(2) — County Court at Law No. 1; County Court at Law No. 2
Collin(2) — County Court at Law No. 1; County Court at Law No. 2
Comal(1) — County Court at Law
Dallas(16) — County Court at Law No. 1; County Court at Law No. 2; County Court at Law No. 3; County Court at Law No. 4; County Court at Law No. 5; County Court at Law No. 6; County Court at Law No. 7; County Court at Law No. 8; County Court at Law No. 9; County Court at Law No. 10; County Criminal Court No. 1; County Criminal Court No. 2; County Criminal Court No. 3; County Criminal Court No. 4; County Criminal Court No. 5; County Criminal Court No. 6; County Criminal Court No. 7; County Criminal Court No. 8; County Criminal Court No. 9; County Criminal Court No. 10; County Criminal Court of Appeals; County Criminal Court of Appeals No. 2; Probate Court of Dallas County; Probate Court No. 1 of Dallas County; Probate Court No. 2 of Dallas County
Denton(2) — County Court at Law; County Court at Law No. 2
Ector(1) — County Court at Law
El Paso(4) — County Court at Law No. 1; County Court at Law No. 2; County Court at Law No. 3; County Court at Law No. 4
Fort Bend(1) — County Court at Law
Galveston(3) — County Court No. 1; County Court No. 2; Probate and County Court
Grayson(2) — County Court at Law; County Court at Law No. 2
Gregg(1) — County Court at Law
Guadalupe(1) — County Court at Law
Harris(17) — County Civil Court at Law No. 1; County Civil Court at Law No. 2; County Civil Court at Law No. 3; County Civil Court at Law No. 4; County Criminal Court at Law No. 1; County Criminal Court at Law No. 2; County Criminal Court at Law No. 3; County Criminal Court at Law No. 4; County Criminal Court at Law No. 5; County Criminal Court at Law No. 6; County Criminal Court at Law No. 7; County Criminal Court at Law No. 8; County Criminal Court at Law No. 9; County Criminal Court at Law No. 10; Probate Court No. 1 of Harris County; Probate Court No. 2 of Harris County; Probate Court No. 3 of Harris County
Harrison(1) — County Court at Law
Hays(1) — County Court at Law
Henderson(1) — County Court at Law
Hidalgo(3) — County Court at Law; County Court at Law No. 2; County Court at Law No. 3
Houston(1) — County Court at Law
Hunt(1) — County Court at Law
Jefferson(2) — County Court at Law; County Court of Jefferson County at Law No. 1
Lubbock(2) — County Court at Law No. 1; County Court at Law No. 2
McLennan(2) — County Court at Law; County Court at Law No. 2
Medina(1) — County Court at Law
Midland(1) — County Court at Law
Montgomery(1) — County Court at Law No. 1
Nacogdoches(1) — County Court at Law
Nueces(3) — County Court at Law; County Court at Law No. 2; County Court at Law No. 3
Orange(1) — County Court at Law
Potter(2) — County Court at Law; County Court at Law No. 2
Randall(1) — County Court at Law
Rusk(1) — County Court at Law
Smith(2) — County Court at Law; County Court at Law No. 2
Tarrant(7) — County Court at Law No. 1; County Court at Law No. 2; Tarrant County Criminal Court No. 1; Tarrant County Criminal Court No. 2; Tarrant County Criminal Court No. 3; Tarrant County Criminal Court No. 4; Probate Court of Tarrant County

Taylor(1)	County Court at Law	
Terrell(1)	County Court at Law	
Travis(2)	County Court at Law	No. 1
	County Court at Law	No. 2
	County Court at Law	No. 3
	County Court at Law	No. 4
Tyler County(1)	County Court at Law	
Upshur(1)	County Court at Law	
	County Court at Law	No. 2
Upton(1)	County Court at Law	
Uvalde(1)	County Court at Law	
Val Verde(1)	County Court at Law	
Van Zandt(1)	County Court at Law	
Victoria(1)	County Court at Law	
Walker(1)	County Court at Law	
Waller(1)	County Court at Law	
Ward(1)	County Court at Law	
Washington(1)	County Court at Law	
Webb(1)	County Court at Law	
Wharton(1)	County Court at Law	
Wheeler(1)	County Court at Law	
Wichita(1)	County Court at Law	
Wilbarger(1)	County Court at Law	
Willacy(1)	County Court at Law	
Williamson(1)	County Court at Law	
Wilson(1)	County Court at Law	
Winkler(1)	County Court at Law	
Wise(1)	County Court at Law	
Wood(1)	County Court at Law	
Yoakum(1)	County Court at Law	
Young(1)	County Court at Law	
Zapata(1)	County Court at Law	
Zavala(1)	County Court at Law	

(1) Authorized but not active as of 1-1-81
(2) Authorized for future effective date

2. Seats: County seat of county of jurisdiction.
3. Membership:
   a. Number: One judge per court.
   b. Selection: County-wide partisan election with vacancies between elections filled by county commissioners.
   c. Qualifications: Vary according to court-creating statute, some include two to five years experience as practicing attorney and requirement of residence in county.
   d. Salaries: Paid entirely by the county. Highly variable.
   e. Terms: Four years.

JUSTICE OF THE PEACE COURTS(972)

1. Jurisdiction: The Texas Constitution provides that each county is to be divided into at least 4, and not more than 8 justice precincts, in each of which shall be elected one justice of the peace, provided that if the precinct includes a city of 8,000 or more inhabitants, one additional justice of the peace shall be elected from such precinct.

   Justice of the peace courts have original jurisdiction in criminal cases when the fine does not exceed $200. They have jurisdiction of civil matters when the amount in controversy does not exceed $200. A justice of the peace may issue warrants of search and arrest, conduct preliminary hearings, serve as ex officio notary public, perform marriages, and serve as coroner in counties were there is no provision for a medical examiner. The justice court also functions as a small claims court in disputes over unpaid wages and salaries when the contested amount does not exceed $200 and in controversies over uncollected bills when the amount does not exceed $150.

2. Seats: Determined by county commissioners.
3. Membership:
   a. Number: One judge per court.
   b. Selection: Partisan elections by voters of respective precincts.
   c. Qualifications: None.
   d. Salaries: Paid entirely by the county. Highly variable.
   e. Terms: Four years.

MUNICIPAL COURTS

1. Jurisdiction: Authorized by statute, municipal courts are operating in 700 cities and towns. Metropolitan cities usually have more than one municipal court. These courts have neither civil nor appellate jurisdiction, but they have original and exclusive jurisdiction over violations of city ordinances (predominately traffic offenses). The municipal courts also have concurrent jurisdiction with justice courts in misdemeanor cases resulting from violations of state laws within the city limits when punishment is limited to fines only of $200 or less. Municipal judges also serve as magistrates of the state.

   Trials in all but seven municipal courts are not of record, with appeals therefrom going to the county court, the county court at law or the district court upon trial de novo. The municipal courts of El Paso, Houston, Longview, Lubbock, Midland, Sweetwater and Wichita Falls are courts of record with appeals on the record perfected in the municipal court.
2. Seats: Determined by the city or town.
3. Membership:
   a. Number: Generally, one court per municipality and one judge per court. Statutes allow some city governing bodies to establish more than one court and/or more than one judge per court. A recent survey identified 863 municipal judicial positions in the state.
   b. Selection: Elected or appointed by the governing body of the city or town as provided by city charter or ordinance.
   c. Qualifications: Determined by the governing body of the city or town.
   d. Salaries: Paid entirely by the city or town. Highly variable.
   e. Terms: Varies from one year to an indefinite term. Often at the will of the governing body of the city or town.

JUDICIAL AGENCIES

1. Office of Court Administration (Art. 2328b). The 60th Legislature (1977) created the state office of Court Administration to assist the Supreme Court and Chief Justice in administrative matters. The law also directs the Supreme Court to promulgate rules of administration and to appoint an administrative director of the courts who serves under the direction and supervision of the Chief Justice and as an additional duty of office, to serve as Executive Director of the Texas Judicial Council. The Administrative Director is directed to consult with various court administrative officers to encourage a more efficient operation of the Texas judicial system and to aid judges, clerks and court coordinators in this regard.

2. Texas Judicial Council (Art. 2320a). Created in 1929, the 18-member Texas Judicial Council is charged with making a continuous study of the organization and operation of the courts. The Council reviews and considers proposals on ways to improve the administration of justice and formulates methods for simplifying judicial procedures. The Council gathers judicial statistics from all levels of courts and makes a detailed annual report to the Governor and to the Supreme Court.

3. Texas Court Reporters Committee (Art. 2324b). The 65th Legislature (1977) enacted a law requiring court reporters to be certified by the Supreme Court and established a Court Reporters Committee to administer tests on the qualifications set out in the Act, collect fees, certify applicants to the Supreme Court, and revoke certificates for unprofessional conduct (appealable to the district court). The Committee is composed of an active district judge who serves as chairman; two members of the Bar; three active official court reporters; and three active freelance reporters; who are appointed by by the Supreme Court for six year terms. The Office of Court Administration performs administrative staff functions for the Committee.

4. State Commission on Judicial Conduct. The Texas Constitution empowers this Commission to consider complaints against any justice or judge concerning acts or conduct which are clearly inconsistent with the proper performance of his duties or which cast public discredit upon the judiciary or administration of justice. The Commission may, if it deems necessary, initiate removal proceedings or take actions for the involuntary retirement of justices or judges who are disabled to the extent that they are unable to perform their duties, or when their disability is likely to become permanent in nature. Members of the Commission consist of two appellate justices, two district judges, one justice of the peace, two attorneys, and four lay members.

NUMBER OF JUDGES IN THE TEXAS JUDICIAL SYSTEM

January 1, 1981

COURT	NO. OF JUDGES
Supreme Court	9
Court of Criminal Appeals	9
Courts of Civil Appeals	31
District Courts	310
County Courts at Law	115
"Constitutional" County Courts	254
Justice of the Peace Courts (Est.)	972
Municipal Courts (Est.)	863
TOTAL JUDGES	2,363

SUBJECT-MATTER JURISDICTION OF TEXAS COURTS
JANUARY 1, 1981

INTRODUCTION

The present court system of Texas, established by the constitutional amendment of 1891, provides for a Supreme Court which is the highest state appellate court for civil matters and a Court of Criminal Appeals which makes the final determination in criminal matters. The state has fourteen intermediate courts of civil appeals. There are no intermediate appellate courts for criminal matters, such appeals going directly from the trial courts to the Court of Criminal Appeals in Austin.*

The state trial courts of general jurisdiction are the district courts, of which there are 310. (Ten of these courts are named "Criminal District Courts," but as will be noted later, only three are strictly limited only to criminal cases on the district level.)

The geographical jurisdiction of each individual district court is established by the specific statute creating that court, and that jurisdiction does not necessarily correspond to the jurisdiction of any previously established court. Each court has one judge. The state pays the judge's base salary and some expenses.

In addition to these state courts, the Texas Constitution provides for a county court in each county presided over by the county judge, who also serves as head of the county commissioners court, the governing body of the county. To relieve the docket of the single "constitutional" county court in each county, the legislature has established statutory county courts at law in 48 counties. As of January 1, 1981, there are eight probate courts and 110 county courts at law. (One of these courts is authorized, but not implemented by the county in which it is located as of January 1, 1981. Two additional courts have been created by the legislature with effective dates at some time in the future.)

The Texas Constitution also provides for a minimum of four justice of the peace courts in each county. Today there are 972 of the justice of the peace courts statewide. Since 1953, these justice courts have also served as small claims courts.

The legislature has created by statute municipal courts in each incorporated city in the state. These courts have original jurisdiction over purported violations of municipal ordinances and concurrent criminal jurisdiction over state violations with the justice of the peace courts, limited to the geographical confines of the municipality.

Trial in the justice of the peace and municipal courts (with seven exceptions) is not of record, and appeals therefrom are on trial de novo to the county court except in certain counties noted later, where the appeal is to a county court at law or to a district court.

Jurisdiction of the various levels of courts is established both by constitutional provision and by statute. Statutory jurisdiction of the courts is established by general statutes providing jurisdiction for all courts on a particular level, as well as by the statute establishing the individual courts. Thus to determine the jurisdiction of any one particular court, recourse must be had first to the constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question and fourth to statutes dealing with specific subject matters, such as the Family Code, which requires a lawyer-judge to hear appeals from actions by non-lawyer judges in juvenile cases.

APPELLATE COURTS

As previously indicated, the Supreme Court is the court of last resort in the state in civil matters. It also has original jurisdiction to issue writs and conduct proceedings for the involuntary retirement or removal of any judge in the state. It is empowered to make rules for the administration of justice, rules of civil practice and procedure for use in all courts having civil jurisdiction and rules governing the licensing of members of the bar of the state. The Court of Criminal Appeals has final state appellate jurisdiction in criminal cases and may issue writs to enforce its judgments. The courts of civil appeals are the intermediate appellate courts of the state, limited however to civil matters.*

* [illegible]

The constitutional power to establish "other courts" (Tex. Const. art. V, sec. 1) apparently does authorize the legislature to establish special district courts with criminal jurisdiction only. Ex Parte Richards, 137 Tex. 520, 155 S.W. 2d 597 (1941). A statute limiting the jurisdiction of a district court to criminal matters was recognized by a court of civil appeals. Cook v. Hollis, 498 S.W. 2d 455 (Tex. Civ. App. - Houston [1st] 1973, no writ). In a similar situation, the Court of Criminal Appeals did not comment on the question. Pittman v. State, 434 S.W. 2d 352 (Tex. Crim. App. 1968).

Several district courts with their jurisdiction so limited have been created, but at this time, only three courts are limited to exclusively criminal district-level jurisdiction:

- Criminal District Court No. 1 of Tarrant County (arts. 1925-41, 1925-42a)
- Criminal District Court No. 2 of Tarrant County (art. 1925-43)
- Criminal District Court No. 3 of Tarrant County (art. 1925-44)

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Four others are limited to criminal, divorce, dependent and neglected children, adoption and civil habeas corpus proceedings:

- Criminal District Court of Dallas County (arts. 1925-11, 1925-22)
- Criminal District Court No. 2 of Dallas County (arts. 1925-13, 1925-22)
- Criminal District Court No. 3 of Dallas County (arts. 1925-14, 1925-16, 1925-22)
- Criminal District Court of Jefferson County (arts. 1925-61, 1925-62)

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As will be noted later, other "Criminal District Courts" cannot be categorized as having only district-level criminal jurisdiction because they also have concurrent jurisdiction with county-level courts in certain matters.

While the courts have ruled the legislature may not limit the jurisdiction of regular district courts, the statutes in various ways express the intention of the legislature that certain district courts give their primary attention to only a portion of those matters over which they have jurisdiction. These courts are instructed to "give preference" to criminal cases and the statutes further provide that only criminal cases are to be filed in those courts:

- 144th (Bexar) - art. 199(37)
- 175th (Bexar) - art. 199(37)
- 187th (Bexar) - art. 199a, sec. 3.014

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In the same manner, seven district courts are to give preference to civil cases and civil cases only are to be filed in those courts:

- 37th (Bexar) - art. 199(37)
- 45th (Bexar) - art. 199(37)
- 57th (Bexar) - art. 199(37)
- 73rd (Bexar) - art. 199(37)
- 131st (Bexar) - art. 199(37)
- 150th (Bexar) - arts. 199(37), 199(150)
- 166th (Bexar) - art. 199(37)

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Perhaps less stringent is the simple statutory instruction that certain courts are to "give preference" to certain matters, with no further restrictions. Thirty courts are thusly instructed to give preference to criminal cases:

- 105th (Nueces) - art. 199(105)
- 107th (Cameron, Willacy) - art. 199(107)
- 138th (Cameron, Willacy) - art. 199(138)
- 147th (Travis) - art. 199(147)
- 182nd (Harris) - art. 199a, sec. 3.010
- 183rd (Harris) - art. 199a, sec. 3.011
- 184th (Harris) - art. 199a, sec. 3.012
- 185th (Harris) - art. 199a, sec. 3.013
- 194th (Dallas) - art. 199a, sec. 3.021
- 195th (Dallas) - art. 199a, sec. 3.022
- 197th (Cameron, Willacy) - art. 199a, sec. 3.024

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DISTRICT-LEVEL COURTS

While the jurisdiction of the appellate courts is quite uniform for each level, that of the various trial court levels is not. To meet the diversified characteristics of the state, the legislature has established varying jurisdiction for the same level of courts depending on the location or local needs.

Broadly, the district courts are the general trial courts for the state, having original jurisdiction in all criminal cases of the grade of felony, cases of divorce, title to land, contested elections and all civil matters wherein the amount in controversy is $1,000 or more. The district court has concurrent civil jurisdiction with the "constitutional" county court in cases of at least $500. In those counties having statutory county courts at law, the district courts by general law have exclusive jurisdiction in civil cases wherein the amount in controversy is $5,000 or more and concurrent jurisdiction with the statutory county courts at law in cases of at least $500 and not to exceed $5,000.*

In 1971, all "constitutional" county courts were divested of eminent domain jurisdiction (art. 3266a), which was placed in the district courts and county courts at law. The statute did not transfer any eminent domain cases pending in the "constitutional" county court on the effective date of the act, therefore, some county courts are continuing to dispose of eminent domain matters filed before 1971. This article lists several instances where eminent domain jurisdiction was transferred from the county court by "special" law pertaining to only one county. In some instances, this transfer was prior to 1971 and in others pending eminent domain cases were transferred. These situations are to be contrasted with the 1971 general statute which transferred jurisdiction of "new" eminent domain cases.

The Supreme Court has repeatedly held that the legislature cannot reduce the jurisdiction of a constitutional district court. Lord v. Clayton, 163 Tex. 62, 352 S.W. 2d 718 (1961); Ramos v. State, 308 S.W. 2d 819 (Tex. Crim. App. 1974). Ex Parte Richards, 137 Tex. 330, 155 S.W. 2d 397 (1941); Rasmussen v. Rasmussen, 122 Tex. 372, 58 S.W. 2d 817 (1933); St. Louis S. W. Ry. v. Hall, 98 Tex. 460, 85 S.W. 786 (1905). See also Castro v. State, 124 Tex. Crim. 13, 60 S.W.2d 211 (1933) and dissenting opinion in Ex Parte Rasmussen, 430 S.W. 2d 209 (Tex. Crim. App. 1968). In Lord v. Clayton, the Supreme Court held that although the statute creating the 136th District Court of Jefferson County expressly limited its jurisdiction to civil cases and other legislation purported to give exclusive jurisdiction in criminal cases to the criminal district court of Jefferson County, the 136th Court was nevertheless a constitutional district court with full power to impanel a grand jury, receive an indictment, and try the accused.

Presently the state statutes purport to limit the jurisdiction of 18 district courts to civil matters only:

14th (Dallas) - art. 1926-11

17th (Tarrant) - arts. 199(17), 199(153)

44th (Dallas) - art. 1926-11

48th (Tarrant) - arts. 199(17), 199(153)

58th (Jefferson) - arts. 199(58), 199(136)

60th (Jefferson) - arts. 199(58), 199(136)

67th (Tarrant) - arts. 199(17), 199(153)

68th (Dallas) - art. 1926-11

95th (Dallas) - art. 1926-11

96th (Tarrant) - arts. 199(17), 199(153)

101st (Dallas) - art. 1926-11

116th (Dallas) - art. 1926-11

134th (Dallas) - art. 1926-11

135th (Calhoun, Goliad, Jackson, Refugio, Victoria) - art. 199(135)

136th (Jefferson) - arts. 199(58), 199(136)

153rd (Tarrant) - arts. 199(17), 199(153)

156th (Aransas, Bee, Live Oak, McMullen, San Patricio) - art. 199(156)

160th (Dallas) - art. 1926-11

*The concurrent civil jurisdiction of some county courts at law has by special statute been increased to $10,000, and others to $20,000.

202nd (Bowie) - art. 199a, sec. 3.033(b)

203rd (Dallas) - art. 199a, sec. 3.030

204th (Dallas) - art. 199a, sec. 3.031

205th (Culberson, El Paso, Hudspeth) - art. 199a, sec. 3.032

207th (Caldwell, Comal, Hays) - art. 199a, sec. 3.035(b)

208th (Harris) - art. 199a, sec. 3.036

209th (Harris) - art. 199a, sec. 3.037

214th (Nueces) - art. 199a, sec. 3.042

Criminal District Court No. 4 of Tarrant County (art. 1926-46)

226th (Bexar) - art. 199a, sec. 3.053

227th (Bexar) - art. 199a, sec. 3.054

228th (Harris) - art. 199a, sec. 3.055

230th (Harris) - art. 199a, sec. 3.056

232nd (Harris) - art. 199a, sec. 3.058

248th (Harris) - art. 199a, sec. 3.073

252nd (Jefferson) - art. 199a, sec. 3.078

262nd (Harris) - art. 199a, sec. 3.088

263rd (Harris) - art. 199a, sec. 3.089

265th (Dallas) - art. 199a, sec. 3.091

} 6

Four courts are similarly instructed to give preference to civil cases:

103rd (Cameron, Willacy) - art. 199(107)

215th (Harris) - art. 199a, sec. 3.043

224th (Bexar) - art. 199a, sec. 3.051

225th (Bexar) - art. 199a, sec. 3.052

} 7

Nine district courts are to give preference to family law matters:

231st (Tarrant) - art. 199a, sec. 3.057

233rd (Tarrant) - art. 199a, sec. 3.059

245th (Harris) - art. 199a, sec. 3.070

246th (Harris) - art. 199a, sec. 3.071

247th (Harris) - art. 199a, sec. 3.072

254th (Dallas) - art. 199a, sec. 3.080

255th (Dallas) - art. 199a, sec. 3.081

256th (Dallas) - art. 199a, sec. 3.082

257th (Harris) - art. 199a, sec. 3.083

} 8

One court is directed by statute to give first preference to family law cases and second preference to criminal cases:

148th (Nueces) - art. 199a, sec. 3.031

} 9

The 63th Legislature (1977) converted all functioning domestic relations and special juvenile courts to district courts of general jurisdiction. However, these 31 courts are to "have primary responsibility for cases involving family law matters":

300th (Brazoria) - art. 1926a, sec. 2.01

301st (Dallas) - art. 1926a, sec. 2.02

302nd (Dallas) - art. 1926a, sec. 2.03

303rd (Dallas) - art. 1926a, sec. 2.04

304th (Dallas) - art. 1926a, sec. 2.05

305th (Dallas) - art. 1926a, sec. 2.06

306th (Galveston) - art. 1926a, sec. 2.07

307th (Gregg) - art. 1926a, sec. 2.08

308th (Harris) - art. 1926a, sec. 2.09

309th (Harris) - art. 1926a, sec. 2.10

310th (Harris) - art. 1926a, sec. 2.11

311th (Harris) - art. 1926a, sec. 2.12

} 10

312th (Harris) - art. 1926a, sec. 2.13
313th (Harris) - art. 1926a, sec. 2.14
314th (Harris) - art. 1926a, sec. 2.15
315th (Harris) - art. 1926a, sec. 2.16
316th (Hutchinson) - art. 1926a, sec. 2.17
317th (Jefferson) - art. 1926a, sec. 2.18
318th (Midland) - art. 1926a, sec. 2.19
319th (Nueces) - art. 1926a, sec. 2.20
320th (Potter) - art. 1926a, sec. 2.21
321st (Smith) - art. 1926a, sec. 2.22
322nd (Tarrant) - art. 1926a, sec. 2.23
323rd (Tarrant) - art. 1926a, sec. 2.24
324th (Tarrant) - art. 1926a, sec. 2.25
325th (Tarrant) - art. 1926a, sec. 2.26
326th (Taylor) - art. 1926a, sec. 2.27
327th (El Paso) - art. 1926a, sec. 2.28
328th (Fort Bend) - art. 1926a, sec. 2.29
329th (Wharton) - art. 1926a, sec. 2.30
330th (Dallas) - art. 1926a, sec. 2.31

10

The other statutory provision observed above - that of limiting the types of cases which can be filed in a particular court - is used alone in several instances. Such a restriction is probably not mandatory on the clerk of the court. Lord v. Clayton, 663 Tex. 42, 3[illegible] S.W. 2d 718 (1961). The statutes provide that [illegible] fourteen courts, civil cases only are to be filed:

11th (Harris) - art. 199(11)
55th (Harris) - art. 199(11)
61st (Harris) - art. 199(11)
80th (Harris) - art. 199(11)

11

113th (Harris) - art. 199(11)
125th (Harris) - art. 199(11)
127th (Harris) - art. 199(11)
129th (Harris) - art. 199(11)
133rd (Harris) - art. 199(11)
151st (Harris) - art. 199(11)
152nd (Harris) - art. 199(11)
157th (Harris) - art. 199(11)
164th (Harris) - art. 199(11)
165th (Harris) - art. 199(11)

11

In six courts, only criminal cases are to be filed:

178th (Harris) - arts. 199(11), 199(174)
176th (Harris) - arts. 199(11), 199(176)
177th (Harris) - arts. 199(11), 199(177)
178th (Harris) - arts. 199(11), 199(178)
179th (Harris) - arts. 199(11), 199(179)
180th (Harris) - arts. 199(11), 199(180)

12

Finally, for one court, the legislature has specified that criminal and tax cases only shall be filed:

49th (Webb) - art. 199(111)

13

As noted above, some 110 statutory county courts at law and 8 probate courts have been created, largely in metropolitan areas. While the jurisdiction of these courts is generally carved out of that given to the "constitutional" county courts, the statutes specify in a few instances that certain jurisdiction normally in the district court is to be exercised by the county court at law concurrently with the district court. Four county courts at law are given concurrent civil jurisdiction with the district courts in specified domestic relations matters:

14

County Court at Law No. 1 of Lubbock County (art. 1970-340)

County Court at Law No. 2 of Lubbock County (art. 1970-340.1)

County Court at Law of Orange County (art. 1970-349A)

County Court at Law of Webb County (art. 1970-360)

Four county courts at law have concurrent jurisdiction with the district court in specified family law matters, eminent domain cases and civil cases when the matter in controversy does not exceed $10,000:

15

County Court at Law of Comal County (art. 1970-368)

County Court at Law of Randall County (art. 1970-371)

County Court at Law of Reeves County (art. 1970-373)

County Court at Law of Walker County (art. 1970-367)

Two county courts at law have concurrent jurisdiction with the district court in specified family law matters, eminent domain cases and civil cases when the matter in controversy does not exceed $20,000:

16

County Court at Law of Hays County (art. 1970-358)

County Court at Law of Medina County (art. 1970-376)

Two county courts at law have concurrent jurisdiction with the district court in specified family law matters and civil cases when the matter in controversy does not exceed $10,000:

17

County Court at Law of Val Verde County (art. 1970-373)

County Court at Law of Wichita County (art. 1970-166d)

Ten county courts at law have, by special statute, concurrent jurisdiction with the district courts in eminent domain matters:

18

County Court at Law of Victoria County (art. 1970-356)

County Court at Law No. 2 of McLennan County (art. 1970-298d)

County Court of Dallas County at Law No. 1 (art. 1970-31.2)

County Court of Dallas County at Law No. 2 (art. 1970-31.2)

County Court of Dallas County at Law No. 3 (art. 1970-31.2)

County Court of Dallas County at Law No. 4 (art. 1970-31.2)

County Court of Dallas County at Law No. 5 (art. 1970-31.2)

County Court at Law No. 2 of Hidalgo County (art. 1970-341a)

County Court at Law of Midland County (art. 1970-370)

County Court at Law of Wise County (art. 1970-374)

Seven county courts at law have concurrent jurisdiction with the district court in eminent domain cases and civil cases when the matter in controversy does not exceed $10,000:

19

County Court at Law of Angelina County (art. 1970-355)

County Court at Law No. 1 of Brazoria County (art. 1970-357)

County Court at Law No. 2 of Brazoria County (art. 1970-357)

County Court No. 1 of Galveston County (art. 1970-342a)

County Court No. 2 of Galveston County (art. 1970-342b)

Probate and County Court of Galveston County (art. 1970-342)

County Court at Law of Tom Green County (art. 1970-369)

Five county courts at law have concurrent jurisdiction with the district court in eminent domain cases and civil cases when the matter in controversy does not exceed $20,000:

- County Court at Law No. 2 of Cameron County (art. 1970-305c)
- County Court at Law No. 2 of Collin County (art. 1970-382a)
- County Court at Law of Gregg County (art. 1970-375)
- County Court at Law No. 3 of Hidalgo County (art. 1970-341b)
- County Court at Law No. 2 of Victoria County (art. 1970-356a, eff. 1/1/82, or earlier as determined by the county commissioners)

} 20

One county court at law has concurrent jurisdiction with the district court in civil cases when the matter in controversy does not exceed $20,000:

- County Court at Law No. 2 of Denton County (art. 1970-352a, eff. 1/1/82, or earlier as determined by the county commissioners)

} 21

Finally, the statute creating one criminal district court provides that it shall have concurrent jurisdiction with the county courts at law in the county in matters of county court criminal jurisdiction:

- Criminal District Court of Jefferson County (art. 1926-61)

} 22

A wide variety of statutory changes have been made blurring the line between district court-level jurisdiction and county court-level jurisdiction. In eight counties, all civil and criminal jurisdiction of the county court, except probate, has been transferred to the district court:

- Bowie (5th, 102nd, 202nd District Courts) - art. 1970-306
- Cass (5th District Court) - Acts 1879, ch. 25, p. 21; Acts 1971, ch. 273, p. 1198
- Falls (82nd District Court) - Acts 1917, ch. 89, p. 243; Acts 1975, ch. 39, p. 84
- Jones (259th District Court) - art. 199a, sec. 3.085(b)
- Robertson (20th District Court) - Acts 1917, ch. 96, p. 256
- Shackelford (259th District Court) - art. 199a, sec. 3.085(b)
- Stephens (90th District Court) - art. 1970-321
- Webb (49th, 111th District Courts) - Acts 1889, ch. 9, p. 5

} 8

In two counties, all civil and criminal jurisdiction of the county court, except probate and eminent domain, has been transferred to the district court (by general statute enacted in 1971 (art. 326a), all "constitutional" county courts were divested of eminent domain jurisdiction):

- Comal (22nd District Court) - Acts 1883, ch. 35, p. 24
- Mason (33rd District Court) - Acts 1887, ch. 73, p. 54

} 24

All civil and criminal jurisdiction of the county court, except probate, eminent domain and jurisdiction to receive guilty pleas in misdemeanor cases has been transferred to the district court in one county:

- Eastland (91st District Court) - art. 1970-141a

} 25

In another county, all county civil and criminal jurisdiction of the county court, except probate and eminent domain, has been transferred to the district court, and the two levels of courts have concurrent jurisdiction to receive guilty pleas in misdemeanor cases:

- Marion (76th, 115th District Courts) - Acts 1887, ch. 36, p. 38; art. 1970-322a

} 26

In another county, all county court civil and criminal cases appealed from justice of the peace courts, except probate and eminent domain, have been transferred to the district court, and the two levels of courts have concurrent jurisdiction in juvenile delinquency cases and in cases where the county court would have had original criminal jurisdiction:

Red River (102nd District Court) - art. 1970-314a — 27

All civil jurisdiction of the county court, except probate and eminent domain, has been transferred to the district court in four counties:

Hills (39th District Court) - Acts 1887, ch. 97, p. 109; Acts 1907, ch. 101, p. 199

Sabine (1st District Court) - Acts 1989, 2nd C.S., ch. 7, p. 90

San Augustine (1st District Court) - Acts 1989, 2nd C.S., ch. 7, p. 90

Wichita (89th District Court) - art. 1970-166b — 28

In one county all civil jurisdiction of the county court, except probate, has been transferred to the district court:

Glasscock (118th District Court) - art. 1970-320 and Acts 1957, ch. 196, p. 389 — 29

In another county, all civil and eminent domain jurisdiction of the county court has been transferred to the district court:

Navarro (13th District Court) - art. 1970-326 — 30

Finally, in six counties, the general jurisdiction in eminent domain cases alone has been transferred from the county to the district courts by special statutes. In 1971, all "constitutional" county courts were divested of eminent domain jurisdiction (art. 3264a):

Camp (76th District Court) - Acts 1971, ch. 582, p. 1952

Fannin (6th District Court) - Acts 1971, ch. 89, p. 820

Gonzales (25th, 2nd 25th District Courts) - Acts 1957, ch. 383, p. 867

Hopkins (8th, 62nd District Courts) - Acts 1967, ch. 44, p. 84

Morris (76th District Court) - Acts 1967, ch. 378, p. 872; Acts 1969, ch. 246, p. 707

Tarrant - art. 1970-62.1 — 31

Rather than transfer jurisdiction absolutely from the county court to the district court, the legislature has in several instances given both the district and county courts concurrent jurisdiction in certain matters. Seven district courts have concurrent criminal jurisdiction with the county court in matters normally in the county court:

207th (Caldwell) - art. 199a, sec. 3.035(b)

Criminal District Court of Dallas County - art. 1926-21

Criminal District Court No. 2 of Dallas County - art. 1926-21

Criminal District Court No. 1 of Tarrant County - art. 1926-41

Criminal District Court No. 2 of Tarrant County - art. 1926-43

Criminal District Court No. 3 of Tarrant County - art. 1926-44

Criminal District Court No. 4 of Tarrant County - art. 1926-46 — 32

In two counties, the district and county court have concurrent jurisdiction in all matters normally in the county court and the district court assigns cases to the county court:

Hill (66th District Court) - arts. 1970-333; 1970-333a

Johnson (18th District Court) - art. 1970-335 — 33

COUNTY-LEVEL COURTS

Generally speaking, "constitutional" county courts have concurrent jurisdiction with justice of the peace courts in civil cases wherein the amount in controversy is $200 or more and less than $500, general jurisdiction over probate cases and exclusive original jurisdiction over all misdemeanors whose punishment for the offense upon conviction is by fine exceeding $200 or where a jail sentence not to exceed two years may be imposed. However, the county courts do not have criminal jurisdiction where a criminal district

court exists unless expressly authorized by statute (Tex. Const. art. V, sec. 16). County courts generally have appellate jurisdiction over cases tried originally in the justice of the peace and municipal courts upon trial de novo.

In general, county courts at law have concurrent jurisdiction with district courts in civil matters where the amount in controversy is at least $200 and not more than $5,000. Other jurisdiction of a county court at law is, broadly speaking, either carved out of the "constitutional" county court's regular jurisdiction or shared with it (concurrent).

The jurisdiction of county courts at law and their relation to the "constitutional" county courts takes many forms. In the creation of three county courts at law, all civil, criminal and probate jurisdiction of the county court was transferred to the county court at law:

- County Court at Law of Houston County (art. 1970-355)
- County Court at Law of Nacogdoches County (art. 1970-361)
- County Court at Law of Reeves County (art. 1970-373)

34

In the creation of eighteen county courts at law, all civil and criminal jurisdiction of the county court was transferred to the county court at law and it was provided that the courts would have concurrent jurisdiction in probate matters:

- County Court at Law No. 4 of Bexar County (art. 1970-301a.1)
- County Court at Law No. 6 of Bexar County (art. 1970-301f)
- County Court at Law of Brazos County (art. 1970-309)
- County Court at Law of Cameron County (art. 1970-305)
- County Court at Law No. 2 of Cameron County (art. 1970-305c)
- County Court at Law of Collin County (art. 1970-302)
- County Court at Law No. 2 of Collin County (art. 1970-302a)

35

- County Court at Law No. 1 of El Paso County (arts. 1970-128, 1970-141.1)
- County Court at Law No. 2 of El Paso County (art. 1970-141.2)
- County Court at Law No. 4 of El Paso County (art. 1970-141.3)
- County Court at Law No. 2 of Grayson County (art. 1970-332a)
- County Court at Law of Hidalgo County (art. 1970-341)
- County Court at Law No. 2 of Hidalgo County (art. 1970-341a)
- County Court at Law No. 3 of Hidalgo County (art. 1970-341b)
- County Court at Law No. 1 of Lubbock County (art. 1970-340)
- County Court at Law No. 2 of Lubbock County (art. 1970-340.1)
- County Court at Law of Walker County (art. 1970-357)
- County Court at Law of Webb County (art. 1970-360)

36

One county court at law was created to exercise concurrent jurisdiction with the district court in all civil and criminal matters, which had earlier been transferred from the county court to the district court. The county court at law and county court have concurrent probate jurisdiction:

- County Court at Law of Comal County (art. 1970-368)

38

The legislature provided, in the creation of three county courts at law, that all civil and criminal jurisdiction of the county court, except probate, was transferred to the county court at law, and that the judge of the county court at law could "act for" the constitutional county judge in probate matters:

- County Court at Law No. 3 of Bexar County (art. 1970-301d)
- County Court of Jefferson County at Law (arts. 1970-112, 1970-113)

37

County Court of Jefferson County at Law No. 2 (art. 1970-126a) — 37

For four county courts at law, all civil and criminal jurisdiction of the county court, except probate, was transferred to the county court at law:

County Court at Law No. 1 of Bexar County (arts. 1970-64, 1970-301)

County Court at Law No. 2 of Bexar County (art. 1970-301)

County Court at Law No. 5 of Bexar County (art. 1970-301e.1) — 38

County Court at Law of Grayson County (art. 1970-332)

In one county, all civil, criminal and juvenile jurisdiction of the county court, except probate, was transferred to the county court at law, and it was provided that the courts were to have concurrent jurisdiction in eminent domain cases:

County Court at Law of Taylor County (art. 1970-343) — 39

Five county courts at law were created with the provision that all civil and criminal jurisdiction of the county court was transferred to the county court at law and the courts would have concurrent jurisdiction in both probate and eminent domain cases:

County Court at Law No. 3 of Nueces County (arts. 1970-339B, 1970-339C)

County Court at Law No. 1 of Travis County (arts. 1970-324, 1970-324d)

County Court at Law No. 2 of Travis County (arts. 1970-324a, 1970-324d) — 40

County Court at Law No. 3 of Travis County (arts. 1970-324a.1, 1970-324d)

County Court at Law No. 4 of Travis County (arts. 1970-324a.2, 1970-324d)

In one instance, all civil and criminal jurisdiction of the county court was transferred to the county court at law, the courts have concurrent jurisdiction in probate and eminent domain and the county court at law is instructed to give preference to original jurisdiction criminal cases:

County Court at Law No. 1 of Nueces County (arts. 1970-339, 1970-339A, 1970-339C) — 41

Similarly, another county court at law in the same county was transferred all civil and criminal jurisdiction of the county court, the courts have concurrent jurisdiction in probate and eminent domain and the county court at law is instructed to give preference to civil cases and criminal cases appealed from courts of inferior jurisdiction:

County Court at Law No. 2 of Nueces County (arts. 1970-339A, 1970-339C) — 42

When the four Harris County civil courts at law were created, it was provided that all civil and eminent domain jurisdiction of the county court, except probate, was transferred to them:

County Civil Court at Law No. 1 of Harris County (art. 1970-79)

County Civil Court at Law No. 2 of Harris County (art. 1970-110d)

County Civil Court at Law No. 3 of Harris County (art. 1970-110e) — 43

County Civil Court at Law No. 4 of Harris County (art. 1970-110f)

For one county court at law, all civil jurisdiction of the county court, except probate, was transferred to it, and it was provided that the courts would have concurrent criminal jurisdiction:

County Court at Law No. 1 of Tarrant County (arts. 1970-33, 1970-34) — 44

For another in the same county, all civil jurisdiction of the county court was transferred to the county court at law and it was provided that the courts would have concurrent probate jurisdiction:

County Court at Law No. 2 of Tarrant County (art. 1970-62.2) — 45

Eminent domain jurisdiction was transferred to two county courts at law, and in all other matters the county court at law and "constitutional" county court have concurrent jurisdiction:

County Court at Law of McLennan County (art. 1970-298b) — 46

County Court at Law No. 2 of Hideman County (art. 1970-298d) — 46

In twenty-four instances, the "constitutional" county court and the county court(s) at law have concurrent jurisdiction in all matters:

County Court at Law of Angelina County (art. 1970-366)

County Court at Law No. 1 of Bell County (art. 1970-350)

County Court at Law No. 2 of Bell County (art. 1970-350a)

County Court at Law No. 1 of Brazoria County (art. 1970-357)

County Court at Law No. 2 of Brazoria County (art. 1970-357)

County Court at Law of Denton County (art. 1970-352)

County Court at Law No. 2 of Denton County (art. 1970-352a, eff. 1/1/82, or earlier as may be determined by the county commissioners)

County Court at Law of Ector County (art. 1970-346) — 47

County Court at Law of Fort Bend County (art. 1970-364)

County Court at Law of Gregg County (art. 1970-375)

County Court at Law of Harrison County (art. 1970-223a)

County Court at Law of Hunt County (art. 1970-354)

County Court at Law No. 1 of Montgomery County (art. 1970-363)

County Court at Law of Medina County (art. 1970-376)

County Court at Law of Midland County (art. 1970-370)

County Court at Law of Orange County (arts. 1970-349, 1970-349A)

County Court at Law No. 2 of Potter County (art. 1970-311b)

County Court at Law of Randall County (art. 1970-371)

County Court at Law of Smith County (art. 1970-348)

County Court at Law No. 2 of Smith County (art. 1970-348a)

County Court at Law of Tom Green County (art. 1970-369) — 47

County Court at Law of Val Verde County (art. 1970-373)

County Court at Law of Victoria County (art. 1970-356)

County Court at Law No. 2 of Victoria County (art. 1970-356a, eff. 1/1/82, or earlier as may be determined by the county commissioners)

In two counties, concurrent jurisdiction may be exercised by the "constitutional" county court and the county court at law in all matters except probate and eminent domain, of which the county court retains exclusive jurisdiction (eminent domain jurisdiction was transferred out of all "constitutional" county courts by general law in 1971):

County Court at Law of Nolan County (art. 1970-347)

County Court at Law of Potter County (art. 1970-311a) — 48

In one county, concurrent jurisdiction may be exercised by the "constitutional" county court and the county court at law in all matters except probate, eminent domain, and civil cases $200 to $500, of which the county court retains exclusive jurisdiction (eminent domain jurisdiction was transferred out of all "constitutional" county courts by general law in 1971):

County Court at Law of Wichita County (art. 1970-166d) — 49

Six of the county courts at law have concurrent jurisdiction with the "constitutional" county court in all matters except probate:

County Court of Dallas County at Law No. 1 (art. 1970-3)

County Court of Dallas County at Law No. 2 (art. 1970-16)

County Court of Dallas County at Law No. 3 (art. 1970-31.1)

County Court of Dallas County at Law No. 4 (art. 1970-31.1)

County Court of Dallas County at Law No. 5 (art. 1970-31.2)

County Court at Law of Henderson County (art. 1970-306)(inactive)

50

In two counties, the county court and the county court at law have concurrent jurisdiction in all matters except eminent domain:

County Court at Law of Guadalupe County (art. 1970-351)

County Court at Law of Hays County (art. 1970-358)

51

Two county courts at law were created with the proviso that they and the county court were to have concurrent jurisdiction in all matters, but that no probate cases were to be filed in the county court at law:

County Court No. 1 of Galveston County (art. 1970-342a)

County Court No. 2 of Galveston County (art. 1970-342b)

52

In three counties, the probate jurisdiction of the county court has been vested in specialized probate courts. Under the provisions of a constitutional amendment adopted in 1973, proceedings in these specialized probate courts are on the record and appeals therefrom are to appropriate court of civil appeals rather than to the district court on trial de novo as is the requirement for probate cases tried in the "constitutional" county courts. The statutes creating six of these probate courts provide that they are to have concurrent probate jurisdiction only with the "constitutional" county court:

Probate Court of Dallas County (art. 1970-31a) 53

Probate Court No. 2 of Dallas County (arts. 1970-31a, 1970-31b)

Probate Court No. 3 of Dallas County (art. 1970-31c)

Probate Court No. 1 of Harris County (art. 1970-110a)

Probate Court No. 2 of Harris County (art. 1970-110a.2)

Probate Court of Tarrant County (art. 1970-345)

53

One probate court has concurrent jurisdiction only with the "constitutional" county court and is to have "primary" responsibility at all times for all mental illness proceedings:

Probate Court No. 3 of Harris County (art. 1970-110a.3) 54

Another specialized probate court, however, has concurrent jurisdiction with the "constitutional" county court in all matters, but only probate cases are to be filed in the probate court:

Probate and County Court of Galveston County (art. 1970-342) 55

Some county courts at law have been created primarily to handle criminal cases. Most of these (22) are limited to criminal cases, concurrent with the "constitutional" county court:

County Criminal Court of Dallas County (art. 1970-31.10)

County Criminal Court No. 2 of Dallas County (art. 1970-31.11)

County Criminal Court No. 3 of Dallas County (art. 1970-31.12)

County Criminal Court No. 4 of Dallas County (art. 1970-31.13)

County Criminal Court No. 5 of Dallas County (art. 1970-31.14)

County Criminal Court No. 6 of Dallas County (art. 1970-31.15)

56

County Criminal Court No. 7 of Dallas County (art. 1970-31.15)

County Criminal Court No. 8 of Dallas County (art. 1970-31.16)

County Criminal Court No. 9 of Dallas County (art. 1970-31.17)

County Criminal Court No. 10 of Dallas County (art. 1970-31.18)

County Criminal Court at Law No. 1 of Harris County (art. 1970-96)

County Criminal Court at Law No. 2 of Harris County (art. 1970-31.11)

County Criminal Court at Law No. 3 of Harris County (art. 1970-110c)

County Criminal Court at Law No. 4 of Harris County (art. 1970-110c.1)

County Criminal Court at Law No. 5 of Harris County (art. 1970-110c.2)

County Criminal Court at Law No. 6 of Harris County (art. 1970-110c.2)

County Criminal Court at Law No. 7 of Harris County (art. 1970-110c.2)

County Criminal Court at Law No. 8 of Harris County (art. 1970-110c.3)

County Criminal Court at Law No. 9 of Harris County (art. 1970-110c.3)

County Criminal Court at Law No. 10 of Harris County (art. 1970-110c.4)

County Criminal Court No. 1 of Tarrant County (art. 1970-62a)

County Criminal Court at Law No. 2 of Tarrant County (art. 1970-62b)

56

Four county courts at law have concurrent jurisdiction with the "constitutional" county court in criminal matters, and further have sole jurisdiction of appeals from justice of the peace and municipal courts:

County Criminal Court of Appeals of Dallas County (art. 1970-31.20)

57

County Criminal Court of Appeals No. 2 of Dallas County (art. 1970-31.12)

County Criminal Court No. 3 of Tarrant County (art. 1970-62c)

County Criminal Court No. 4 of Tarrant County (art. 1970-62d)

57

JUSTICE OF THE PEACE COURTS

Justice of the peace courts have original jurisdiction in civil cases wherein the amount in controversy does not exceed $900 and in criminal misdemeanors where punishment is by fine only not to exceed $200. The justice of the peace courts also function as small claims courts in disputes over unpaid wages and salaries where the contested amount does not exceed $200 and in controversies over uncollected bills where the amount does not exceed $150. Trials in justice of the peace courts are not of record. Appeals from these courts are upon trial de novo in the county court, the county court at law, or the district court.

In 32 counties, the county court by special statute has been given concurrent civil jurisdiction with justice of the peace courts in that county:

Armstrong (art. 1970-193)

Atascosa (Acts 1915, ch. 88, p. 141)

Bailey (Acts 1911, ch. 93, p. 171)

Burleson (art. 1970-242)

Cochran (arts. 1970-205, 1970-224)

Collingsworth (art. 1970-315)

Colorado (art. 1970-205)

Crosby (art. 1970-317)

Dawson (Acts 1915, ch. 88, p. 141)

Deaf Smith (art. 1970-209)

Dickens (Acts 1915, ch.59, p. 109)

Fisher (art. 1970-317)

Gaines (Acts 1915, ch. 88, p. 141)

58

Garza (Acts 1915, ch. 88, p. 141)

Goliad (Acts 1885, ch. 45, p. 57)

Gonzales (Acts 1957, ch. 127, sec. 1, p. 278)

Haskell (Acts 1919, ch. 33, p. 55)

Hemphill (Acts 1915, ch. 125, p. 192)

Hockley (art. 1970-234)

Kent (art. 1970-334)

Lamb (Acts 1911, ch. 93, p. 171)

Lee (art. 1970-242)

Lynn (Acts 1915, ch. 88, p. 141)

McMullen (Acts 1915, ch. 88, p. 141)

Mitchell (Acts 1919, ch. 11, p. 15)

Parmer (art. 1970-209)

Randall (art. 1970-309)

Scurry (Acts 1919, 2d C.S., ch. 13, p. 39)

Stonewall (art. 1970-352)

Terry (Acts 1915, ch. 88, p. 141)

Washington (art. 1970-308)

Yoakum (Acts 1915, ch. 88, p. 141)

} 58

In two additional counties, the county court at law has by special statute been given concurrent civil jurisdiction with the justice of the peace courts:

County Court at Law of Nolan County (art. 1970-347)(inactive)

County Court at Law of Potter County (art. 1970-311a)

County Court at Law No. 2 of Potter County (art. 1970-311b)

} 59

The county court in eight counties has been given concurrent jurisdiction with the justice of the peace courts in both civil and criminal matters:

Blanco (art. 1970-337, sec. 4)

Edwards (art. 1970-330a, sec. 4)

Gillespie (art. 1970-312)

Irion (art. 1970-304)

Kimble (Acts 1931, ch. 320, p. 793)

Menard (art. 1970-332)

Schleicher (Acts 1931, ch. 298, p. 754)

Sterling (art. 1970-316)

} 60

Nine county courts at law have been given concurrent jurisdiction with the justice of the peace courts in the county in both civil and criminal cases:

County Court at Law of Cameron County (art. 1970-306)

County Court at Law No. 2 of Cameron County (art. 1970-306c)

County Court at Law of Grayson County (art. 1970-332)

County Court at Law No. 2 of Grayson County (art. 1970-332a)

County Court at Law No. 1 of Lubbock County (art. 1970-340)

County Court at Law No. 2 of Lubbock County (art. 1970-340.1)

County Court at Law No. 1 of Nueces County (art. 1970-339)

County Court at Law No. 2 of Nueces County (art. 1970-339A)

County Court at Law No. 3 of Nueces County (art. 1970-339C)

} 61

Finally, one county court at law has been given concurrent jurisdiction with the justice of the peace courts in the county in criminal matters only:

County Court at Law No. 1 of Montgomery County (art. 1970-363)	62

MUNICIPAL COURTS

Municipal courts have original and exclusive jurisdiction over purported violations of city ordinances and concurrent jurisdiction with justice of the peace courts over state misdemeanors occuring within the jurisdiction of the municipality where punishment upon conviction is by fine only not to exceed $200.

Trials in all but seven municipal courts are not of record with appeals therefrom going to the county court, the county court at law, or the district court upon trial de novo. The municipal courts of El Paso, Houston, Longview, Lubbock, Midland, Sweetwater and Wichita Falls, were created by special statutes as municipal courts of record with appeals therefrom going to the county court on the record perfected in the municipal court.

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Mills
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Williamson

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Bandera
Bexar
Brooks
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FOURTH (cont'd)
Edwards
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Kendall
Kerr
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Kinney
LaSalle
McMullen
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Maverick
Medina
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Val Verde
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SEP 17 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor
of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

On Appeal from the
United States Court of Appeals
for the Fifth Circuit

Brief Amicus Curiae on Behalf of Appellees

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NO. 80-1290

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, et al.,

Appellants,

v.

JOHN L. FASHING, et al.,

Appellees.

Brief Amicus Curiae
on Behalf of Appellees

The County Court at Law Judges Association of the State of Texas has obtained the written consents of the attorneys for both the appellants and appellees to the filing of the attached brief amicus curiae. The consents have been filed with the Clerk.

INTEREST OF AMICUS CURIAE

The members of the County Court at Law Judges Association of the State of Texas are persons whose access to Texas state and federal elective offices was seriously burdened by art. XVI, § 65 of the Texas Constitution, which was declared invalid by the United States District Court for the Western District of Texas in this case. The political and personal interest of the Association and its members is substantial.

To the Association's knowledge neither the appellants or appellees in this case have presented any argument to either the District Court or the Court of Appeals that art. XVI, § 65 of the Texas Constitution constitutes a bill of attainder, and as such violates U.S. Constitution article I, § 10, cl. 1. The appellants suggest this analogy by their arguments in justification of art. XVI, § 65.

The Association also contends that if this Court not find art. XVI, § 65 to be punitive and in the nature of a bill of attainder, but instead find it to be merely regulatory, then as a regulation it raises what is in effect an irrebuttable presumption which denies due process.

Finally, the Association contends this Court should apply the same standard of review to this interference with candidacy that it applies to regulation of voting, political association, and political speech. Although this has been raised by the appellants, they have not fully explored the relationship of candidacy to other election rights. [Appellants' Jurisdictional Statement (p. 7, 9); Appellants' Brief (4,6)].

SUMMARY OF ARGUMENT

Appellants ask this Court to defer to the legislative determination represented by

art. XVI, § 65 of the Texas Constitution which was struck down by the U.S. District Court. Amicus argues that in their arguments defending the classification scheme of this provision they unintentionally show it to be an unconstitutional denial of due process falling between the categories of bills of attainder and impermissible irrebuttable presumptions. If this Court should find the classification scheme is not justified, they argue that Texas may regulate candidacy piecemeal because candidacy is not a fundamental right. Amicus argues it is the election process itself which is constitutionally fundamental and that election rights take their character from that process. Amicus urges that this Court's constitutional responsibility requires it to review with a single rigorous standard every election regulation challenged as a legislative threat to basic freedoms.

ARGUMENT

The overriding issue in this case is not whether Texas may regulate elections or how it must do so. Rather the central inquiry is the degree of care which the United States Constitution imposes on Texas in the context of the concerns for separation of powers and federalism.

At issue in this case is the Constitutional legitimacy of that portion of art. XVI, § 65 of the Texas Constitution which automatically deprives the holders of some, but not all Texas public offices of their offices if they become candidates or announce that they are candidates for an office other than the office they hold.

The State of Texas may legitimately determine that these offices be filled by election. Texas may, and, indeed has a duty to, regulate elections. Texas may set qualifications for candidates and office-

holders. Texas may prohibit the holding of more than one office simultaneously. Texas may prohibit an officeholder from engaging in partisan political activity during the term of office holding. Texas may prohibit the use of the office for political purposes. Texas may define and prohibit misconduct or abuse by officeholders. Texas may enforce such prohibitions as these with appropriate sanctions appropriately applied. All these things Texas may do, if it does them in ways which are fundamentally fair. Amicus urges that art. XVI, § 65 is unreasonable and unfair and that from its effects it can be inferred that it is the product of a legislative process unacceptably careless of fundamental liberties guaranteed by the U.S. Constitution.

The most basic idea of fairness requires that persons in like circumstances

be treated in a like manner. However, circumstances which superficially appear alike may, with a closer view, disclose differences which legitimate different treatment. In this case, the U.S. District Court found that state offices which are similar--district court judgeships and judgeships of the county courts of law--are treated differently. The holder of a state district court judgeship does not automatically resign that lose his office by announcing candidacy or by becoming a candidate for an office other than district court Judge. However, the instant the holder of a judgeship of the county court at law announces candidacy or becomes a candidate for another office, the holder automatically resigns his office. The U.S. District Court reasoned that if the different treatment of judges of county courts at law under art. XVI, § 65 was related to

some difference in these offices it could be upheld.

Based on the testimony of the defendants-appellants (J.A.6.), the District Court found the following purposes for art. XVI, § 65: (1) the prevention of abuse by office holders; (2) the compulsion of office-holders to give their undivided attention to their offices; (3) the elimination of appearances of impropriety; and (4) the prevention of interest conflicts (J.A. 18). Because these purposes were equally appropriate to district court judges and judges of the county courts of law, the U.S. District Court concluded it was irrational to treat what were like circumstances in a different manner. (J.A. 18) Amicus urges this Court to affirm this judgment. To deny the District Courts conclusion implies finding which are Constitutionally unacceptable.

Appellants argue alternatively that the District Court's finding of similarities is wrong and, even if it is correct, Texas may treat like classes of offices differently.

I

Directly challenging the decision of the U.S. District Court, the appellants assert that the classification scheme of art. XVl, § 65 has a rational basis. They say that the officeholders burdened by art. XVl, § 65 are, as a matter of fact, more likely to abuse their positions when seeking election to other offices than other officeholders. (Appellants' Brief, pp. 9, 14, 15) They describe art. XVI, § 65 as a legitimate deterrent of official misconduct (Appellants' Brief 9, 14, 15). [Some of the offices not burdened by Article 16, Section 65 have the same burden imposed by art. XI, § 11 of the Texas Constitution. An important example is the office of municipal judge

(Appellants' Brief p. 16).] Appellants concede that many significant offices exist whose holders are not burdened (Appellants' Brief p. 14-16). Appellants' implication is that if "county level officeholders" are susceptible to temptations and consequently in need of deterrence, the holders of offices not so burdened are somehow inherently less susceptible.

In effect appellants ask this Court to presume a rational basis for the classification scheme at issue, in the absence of any legislative history, because there might have been a legislative determination that deprivation of office is necessary to deter a "tainted" class of officeholders from future misconduct. Appellants' argument nearly supports an inference that art. XVI, § 65 functions as a bill of attainder. See Nixon v. Administrator of General Services 433 U.S. 425, 475-476 (1977). The only element missing is the requirement that

bills of attainder be imposed on a named individual or easily identifiable members of group; this measure burdens the holders of such diverse offices as inspectors of hides and animals, county surveyors, and judges of county courts at law (Appellees' Motion to Affirm p. 5). Appellants attempt to identify a "tainted" class by labeling the offices burdened by Article 16, Section 65 as "county officeholders" (Appellants' Brief pp. 4, 14-16). There is no reference to "County officeholders" in art. XVI, § 65, but if it could be assumed that the class, "county officeholders," was sufficiently specific, the punitive character of art. XVI, § 65 is well established by appellants. Thus art. XVI, § 65 would be unconstitutional as a bill of attainder prohibited by art. I, § 10, cl. 1 of the United States Constitution.

If appellants have not shown every element of a functional bill of attainder,

appellants still may have made an argument sufficient to warrant a second analogy: art. XVI, § 65 raises a "permanent irrebuttable presumption" of the type "long disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments" Cleveland Board of Education v. LaFleur 414 U.S. 632, 644 (1974).

There is a single constitutional theme recurring in bills of attainder and impermissible irrebuttable presumptions: such measures infringe on the realm of competence which the separation of powers doctrine reserves to the judiciary. Regulations struck down under these principles ordinarily penalize individuals without judicial proceedings in the first instance, or judicial review. Bills of attainder can be reasonably characterized as aggravated impermissible irrebuttable presumptions. The Fifth and Fourteenth

amendments guaranteeing due process certainly were intended to extend not limit due process rights guaranteed by the Bill of Attainder clause.

Art. XVI, § 65 requires that holders of certain state offices cannot be candidates for other offices without abusing the powers of their office; misappropriating public funds, property or servants under their control; or neglecting the duties of their offices. [It is never made clear why incumbents seeking re-election would not be prone to engage in such misconduct, yet they are not automatically deprived of their offices by announcing their intention to stand for re-election (art. XVI, § 65)].

The right to choose to be a candidate for public office is at least a substantial right to be balanced against the interests which appellants say are served by art. XVI, § 65. (Appellants' Brief pp. 4, 6). Alternative means of securing these interests are

available, making the infringements of this article unnecessary to the achievement of the legitimate goals advanced by appellants. Offenses constituting official misconduct are defined by Title 8, Chapter 39 of the Texas Penal Code and include all of the activities which art. XVI, § 65 is supposed to deter except neglect of office. Article 2.03 of the Texas Code of Criminal Procedure provides that neglect or failure by an officer to perform duties shall be presented by information or indictment (when appropriate) to a court having jurisdiction. Additionally, electors may turn out of office abusive or neglectful officials. (See Appellants' Brief p. 6)

Thus to accept the arguments offered by appellants to support their assertion of the existence of a rational basis for the classification scheme of art. XVI, § 65 is to deny or at least momentarily forget two

important strands of this Court's jurisprudence concerning constitutional limits on legislation.

II.

Appellants' second argument does not challenge the District Court's finding that offices burdened by art. XVI, § 65 and unburdened offices are equally susceptible to the abuses which the measure is supposed to deter. Appellants' responses to interrogations concede as much (J.A. p. 6). Appellants excuse the lack of a rational basis for the classification by saying that Texas is not constitutionally bound to legislate against abuses comprehensively and simultaneously. (Appellants' Brief p. 11).

Appellants' argued conclusion,--that this Court should defer to the legislative judgment embodied in art. XVI, § 65--simply does not follow from appellants' accurate observation that to date this Court has

declined to declare candidacy a fundamental right. In the middle of their argument appellants concede that art. XVI, § 65 could reasonably be reviewed by this Court to see if the classification scheme passes a more difficult test than mere rationality, that is, the standard proposed by the United States Court of Appeals for the Fifth Circuit in the case of Morial v. Judiciary Commission of the State of Louisiana 565 F2d 295, 304 (1977). Appellants say this Court could decide the issue by answering the question: is the regulation "reasonably necessary for the protection of the interests of the state?" (Appellants' Brief p. 11). By conceding the appropriateness of the Morial standard, appellants also concede that the only right which they believe to be at issue, candidacy, is something more than a non-fundamental right. Amicus agrees and urges the court to declare a single rigorous

standard of review to be appropriate in every aspect of election regulation.

Except for association and speech, election rights are not inherently fundamental. Voting and candidacy implement a process which is itself politically fundamental i.e., it involves the presuppositions upon which even the United States Constitution is based. Central to this process is the notion that individual political freedom is the essence of social and political order.

By establishing a republic with limited and defined powers the founders meant to protect what this Court has described as the "potential fluidity of American political life" American Party of Texas v. White, 415 U.S. 767, 787 (1974). Neither did they imagine that a society could exist without effective government. In Federalist No. 37

James Madison wrote:

> Among the difficulties encountered by the convention, a very important one must have lain in combining the requisite stability and energy in government with the inviolable attention due to liberty and to the republican form. The Federalist Papers 226 (C. Rossiter ed. 1961).

This Court has the gravest kind of responsibility in cases such as this one because the assertion than an election right has been wrongly infringed is an assertion that the continued existence of the United States as a representative republic is endangered by an act of the representatives themselves. A real fear of the Founders was the propensity of popular governments to self destruction when a faction managed to vote to itself a proprietary title to the republic. See The Federalist Papers, No. 39, 241 (C. Rossiter ed. 1961). The Founders gave this Court its responsibility to the Constitution because they feared that the other

branches would not always fulfill their own Constitutional obligations to it.

The protection of free association and speech is esential to popular government. A representive republic requires, in addition, the protection of voting and candidacy. Choosing representatives necessarily means counting votes, but voting is not an end in itself. Similarly if this Court were to declare candidacy a fundamental right, candidacy could not be an end in itself. To have the right to vote or be a candidate without the right to speak to others to encourage their association in a campaign would be a cruel mockery of the republican form. They are inextricably interwined.

Maintaining candidacy as an important but not fundamental election right has the undesirable effect of suggesting that some aspect of elections is less important than others and that legislative acts which

regulate it do not require the same painstaking as acts regulating voting, association, or political speech.

The principles of federalism and deference to legislative determinations do not preclude this Court from requiring that a high degree of care be taken when such a fundamental process as elections is regulated.

CONCLUSION

For all the foregoing reasons, Amicus urges this Court to affirm the decision of the Court of Appeals in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Brief Amicus Curiae was served on the parties, James P. Allison, Assistant Attorney General, P.O. Box 12448, Capitol Station, Austin, Texas 78711; Raymond C. Caballero, 521 Texas Avenue, El Paso, Texas 79901, by registered mail.

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